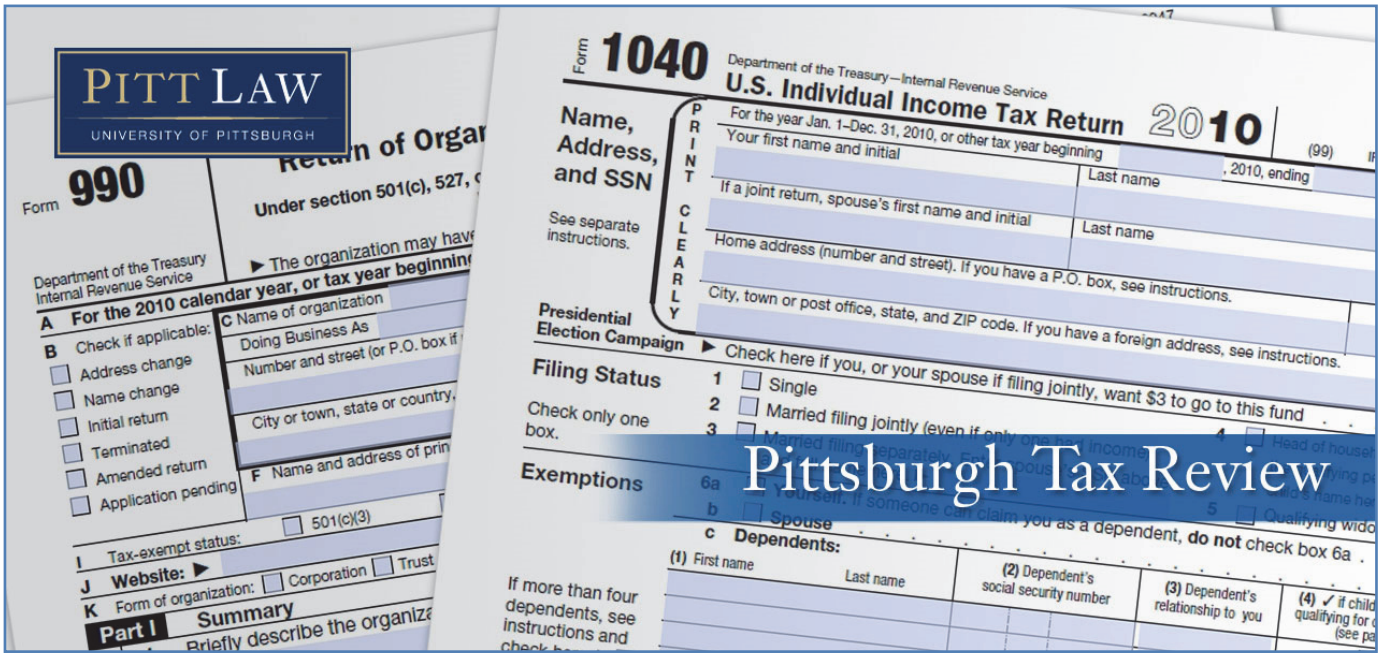

Volume 11 (2013) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2013.21 | http://taxreview.law.pitt.edu

"LET'S GET TOGETHER": COLLABORATIVE TAX REGULATION

Danshera Cords

"LET'S GET TOGETHER":[1] COLLABORATIVE TAX REGULATION

Danshera Cords[*]

"The IRS is not special."[2]

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[1] Chet Powers' song, originally released by the Kingston Trio in 1964. The song was later remade by a number of artists, including the Youngbloods, KC and the Sunshine Band, and Jefferson Airplane. This song's lyrics suggest peace and harmony, a lesson that translates well into many other contexts, perhaps including regulatory development.

[*] Professor of Law, Albany Law School. I am deeply indebted to the participants of the 2012 Critical Tax Conference, the 2012 International Conference of Law and Society, Eric A. Chiappinelli, Deborah S. Kearns, Leslie Book, and Patricia Salkin for comments on and discussions of earlier drafts of this Article. Albany Law School has generously provided financial support of this project; and Andrew Woodman, 2013 J.D. candidate, provided valuable research assistance.

[2] Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc).

Pitt Tax Review | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2013.21 | http://taxreview.law.pitt.edu

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INTRODUCTION

High school civics classes and *Schoolhouse Rock!*[3] create an image of democracy and lawmaking as resting on a foundation of voter participation in the law-making process, either through the election of representatives or the casting of votes on a ballot issue. However, over time Congress has delegated to administrative agencies substantial authority to make law. As the government and society have become more complex, Congress has had to delegate much of its legislative authority to administrative agencies just to keep up with the growing need for federal regulation. Indeed, administrative agencies create many times more laws than Congress each year.

These agencies are part of the Executive Branch of government. Each agency is usually created to address a single area, i.e., the Environmental Protection Agency and the Federal Election Commission. The Congressional mandates usually allow an agency to operate independently and allows an agency to develop specialized knowledge and technical expertise with respect to the assigned subject matter; expertise that Congress would be unable to develop in light of the very broad areas in which Federal legislation operates. To protect against agency overreaching and ensure that the lawmaking function remain democratic, administrative rulemaking procedures must be open, transparent, and accessible.[4]

The Administrative Procedure Act ["APA"] creates a framework for the procedural functions of federal administrative agencies, including rulemaking.[5] The APA includes procedures for formal trial-like, and

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[3] *Schoolhouse Rock!* was a series of animated videos and songs aired on ABC between 1975 and 1985. From 1993 to 2009, new episodes have been selectively created and released. One of the videos, "I'm Just a Bill," has a "bill" explain to a young child that to become a law it would have to pass through both the House and the Senate and then be signed by the president. Several copies of this video have been posted to YouTube, making the videos a hit again as parents share them with their children. *See, e.g.*, Catalina Camia, *"Schoolhouse Rock" teaches how a bill becomes law*, USA TODAY (Jan. 14, 2013, 6:11 PM), http://www.usatoday.com/story/onpolitics/2013/01/14/schoolhouse-rock-bill-congress-anniversary/1834197/.

[4] Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 369 (1972) ("The need for, and desirability of, public participation in [notice-and-comment rulemaking] is axiomatic.").

[5] 5 U.S.C. § 551 (2012).

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DOI 10.5195/taxreview.2013.21 | http://taxreview.law.pitt.edu

informal notice and comment, rulemaking.[6] Notwithstanding public notice and the opportunity to available to affected parties to comment, there is often very little public involvement.[7]

To ensure that an agency remains compliant with its mandates and established procedural rules, the APA also establishes a presumption strongly favoring judicial review. As a result, administrative agencies must create a record relating to the rulemaking process, including the agency's consideration of input received. Although sometimes falling short, these aspects of the regulatory process are generally respected by federal agencies.

To enhance public participation in the rulemaking process agencies have conducted innovative experiments with notice to increase the number and quality of responses to rulemaking announcements. Congress and the Executive have approved and even encouraged some efforts. The results have had mixed success.

Several models have developed under the rubric of "collaborative rulemaking." What these models have in common is that they formally or informally involve affected parties in the process of developing the rules, when the agency position has not yet hardened into a published proposed rule. Federal tax regulations could benefit from the use of a more collaborative approach in appropriate cases.

Recommendations to improve participation in the process by which Federal tax rulemaking "reflect an increased awareness that the IRS plays one of the more prominent roles of all agencies in the lives of Americans."[8]

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[6] Throughout this article the terms "rule" and "regulation" are used interchangeably. One significant issue that this article considers is the extent to which directives issued by an administrative agency are rules. Formal rulemaking procedures are required only in certain narrow circumstances. The terms "rule" and "regulation" are used interchangeably. The term "rulemaking" is used to describe the process of developing a rule or regulation.

[7] *But see* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 106 (4th ed. 2011) (recapping a number of rulemakings that garnered tens of thousands or even hundreds of thousands of response; also, noting the possibility that such huge response overwhelms agency staff and makes identification of useful comments much more difficult).

[8] Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 583 (2012) (noting the continuing Congressional expansion of the IRS' responsibilities beyond traditional revenue collection functions).

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DOI 10.5195/taxreview.2013.21 | http://taxreview.law.pitt.edu

Congress delegates to the United States Department of the Treasury ("Treasury"), and by implication the IRS, much of its authority to administer the tax system and collect taxes. The federal tax system is so complex that without significant delegation of authority to engage in rulemaking the system would be unworkable. The extent to which simplification would be beneficial is something that must await another day. Given the antidemocratic nature of Congressional delegation of rulemaking authority, it is important that taxpayers have an adequate opportunity to become involved in the rulemaking process. Public participation in the rulemaking process is often most effective during rule development. Like many other agencies, Treasury and the IRS solicit input from many organized groups, including the American Bar Association Section on Taxation (ABA Tax), the Tax Executives Institute (TEI), and the American Institute of Certified Public Accountants (AICPA), along with other professional organizations as they develop each year's priority guidance plan. In addition, these same groups often propose regulations and suggest guidance that are of concern to their organizations' membership.[9]

Informal input is not new to the development of tax regulations.[10] During his tenure as IRS Chief Counsel, Donald Korb stated it had "been going on forever where people come in and give us proposed ideas—often in secret."[11] Tax rules and regulations have often been thought of as being somehow different from those in other areas.[12]

Scant attention has been given to the possibility of using collaborative approaches for the promulgation of Treasury regulations and other tax

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[9] Treas. Reg. § 601.601(a); Treas. Order 111-01 (Mar. 16, 1981); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with the Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1205 (2008) [hereinafter Hickman, *A Problem of Remedy*].

[10] Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 659–62 (1985).

[11] Dustin Stamper, *Korb Laments Penalty Pileup, Promises More Practitioner Initiated Guidance*, 117 TAX NOTES 421 (2007).

[12] Paul. L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (2006).

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guidance.[13] Recently, scholars have begun to question more critically the procedures Treasury uses to promulgate substantive tax rules.[14] Although it has long been contested by the IRS, the Supreme Court of the United States has finally put to rest the longstanding claim that some tax regulations were to be judged under *National Muffler* and *Mead*, rather than under the iconic *Chevron* standard.[15] The Supreme Court held that that "We are not inclined to carve out an approach to administrative review good for tax law only."[16]

This Article accepts the premise that Treasury regulations must be created under the requirements of the APA. Using this foundation, this Article explores ways that collaborative rulemaking procedures could be used to improve the quality of the tax law and its administration. Moreover, there are many tax regulations for which a collaborative approach would be appropriate. Increasing participation in tax rulemaking would further the IRS' current mission.[17] Many rulemaking projects could benefit from increased participation. Involving constituents early in the process will benefit tax administration in two ways. First, greater input will result in better regulations. Second, taxpayer involvement in the rulemaking process will increase taxpayers' systemic investments and likely lead to better compliance.[18]

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[13] Many articles have scrutinized procedure in rulemaking and procedural errors in promulgating tax regulations.

[14] *See* Hickman, *A Problem of Remedy*, *supra* note 9, at 1161–62.

[15] When applied to tax regulations, many practitioners valued the application of the *National Muffler* standard, because it was perceived as giving less deference to IRS regulations in some cases. Patrick J. Smith, *Life After* Mayo*: Silver Linings*, 131 TAX NOTES 1251, 1252 (2011). However, in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 713 (2011), the Supreme Court concluded that tax should not have its own system of regulation and deference to agency actions.

[16] *Mayo*, 131 S. Ct. at 713.

[17] The IRS states that its mission is to "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all." IRS Statement of its Mission and Statutory Authority at http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority.

[18] Dennis J. Ventry, *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 437–38, 445 (2008) (suggesting also that such involvement would help further the IRS' mission to provide service to taxpayers).

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Effective collaborative rulemaking requires a new rulemaking paradigm. Rather than develop a rule, release a proposal, receive public comments, review comments, and finalize the rule, Treasury would identify the need for a new rule, consider the appropriateness of the project for collaboration, and, if appropriate, identify and invite into the process the major stakeholders. This participation would begin after Treasury or the IRS decided to make a rule, but before the rule was developed into a proposed rule. Although the collaborative process may be somewhat cumbersome initially, it should reduce enforcement costs and litigation in the future because the regulations developed should reflect both the needs of the agency and the concerns and challenges identified at the outset. Moreover, it should help develop better, i.e., more effective, tax regulations and improve public perceptions regarding the tax system.

This Article identifies criteria that could be used to identify rules for which a collaborative approach could result in a better rule, easier enforcement, and greater procedural access for taxpayers. In addition, the Article recommends the adoption of mechanisms to increase participation and ensure better access to the tax rulemaking generally.

Part I describes the current role administrative agencies play in the lawmaking function. Part II first explores traditional rulemaking, and then examines collaborative rulemaking as it is used in other agencies. Part III describes Treasury's current practices for rulemaking and the issuance of other guidance. Part IV describes a method that would allow Treasury to identify areas where it would be beneficial to allow greater taxpayer involvement in regulation development. Part IV also explores the costs and benefits of using collaborative approaches in the development of Treasury Regulations and other tax guidance. This Article concludes that the benefits would outweigh the costs in many instances and recommends that more collaborative approach be used in appropriate cases.

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I. THE ROLE OF ADMINISTRATIVE AGENCIES

Federal administrative agencies regulate a host of economic, social, health, business, and individual activities.[19] At the federal level, there are hundreds of agencies.[20] These agencies' rulemaking can create law, set government policy, and create agency procedures. Administrative agencies annually craft as many as 15 times more laws than Congress.[21]

Administrative agencies are expected to be experts in their field and have an ability to bring technical expertise to the subject matter.[22] Such specialization should also result in greater understanding of its constituents' needs. One concern is that to obtain such subject matter expertise, the agency may become so intimately involved with those that it regulates that the powerful interests may "capture" the agency, obtaining results that are favorable to industry but not necessarily in the best interests of the country.[23]

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[19] Whether the growth of the administrative state is good or bad is a matter that is hotly debated. This Article is agnostic on the subject of the relative value of the creation of current or additional agencies. For these purposes, it is sufficient to acknowledge this existence of this expansion.

[20] *See generally* A–Z Index of U.S. Governmental Departments and Agencies, http://www.usa.gov/directory/federal/index.shtml (last visited Feb. 18, 2013) (listing all U.S. Government departments and agencies).

[21] Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1416 (2012) ("estimates suggest that more than ninety percent of modern American laws are rules written by agency officials") (citing KENNETH F. WARREN, ADMINISTRATIVE IN THE POLITICAL SYSTEM 260 (5th ed. 2011); Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 ISJLP 33 (2005) (discussing generally the nature and scope of administrative rulemaking) [hereinafter Coglianese, *The Internet and Citizen Participation*]; Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 354 (2004). However, the nondelegation doctrine limits the manner and amount of power that Congress or the president can delegate to other entities. *See, e.g.*, Social Sec. Bd. v. Nierotko, 327 U.S. 358, 368–69 (1946) (discussing the limitation on administrative power). *See also* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 11:13 (3d ed. 2012).

[22] Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (discussing a rationale for presidential oversight of the regulatory process); *but cf.* Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 13–14 (1984) (responding to proponents of presidential review of agency action).

[23] KERWIN & FURLONG, *supra* note 7, at 174.

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Critics of the administrative state have raised concerns about the degree to which agency personnel are insulated from the electoral process. Although administrative agencies are often in a better position to develop specialized rules, making delegation of legislative power efficient, "such delegations . . . are also antidemocratic."[24]

Elected officials considering the enactment of new legislation are likely to weigh their constituents' likely reactions to such legislation in deciding how to vote on a measure. In contrast, most agency staff members are immune from the politics of the moment. This insulation does not entirely eliminate political consideration as agency heads may be a little more sensitive to the political winds because they are appointed and serve at someone else's pleasure, often the President's. Many proponents suggest that the APA's mandate of the opportunity to comment makes agencies' decisions much more democratic.[25] Over time, Congress has adjusted, but not repealed or replaced, the APA. The APA continues to provide a framework for agency procedures.[26]

Before the possibilities of collaborative rulemaking are explored, Part II lays out the basic framework under which rules are currently made. This part covers both traditional rulemaking and other agencies' experience with various models of collaborative rulemaking.

II. ADMINISTRATIVE RULES AND THEIR CREATION

Many rules or regulations promulgated by administrative agencies have the force and effect of law. However, the development and adoption of regulations does not engage the legislative process. As a result, the delegation of rulemaking authority places significant power in the hands of administrative agencies.

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[24] Hickman, *A Problem of Remedy*, *supra* note 9, at 1204; *but cf.* KERWIN & FURLONG, *supra* note 7, at 65 ("The opportunity to participate in the development of rules lends the process an element of democracy not present in other forms of lawmaking.").

[25] *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005).

[26] 5 U.S.C. § 551 (2012).

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Limitations on an agency's power to craft rules with the force and effect of law come from all three branches of government. Congress constrains agency authority through both the enabling legislation and legislative restrictions on agency discretion. "[A]dministrative procedures, like notice and comment, leverage politicians' scarce resources while letting external actors attempt to influence regulation without going directly through their elected representatives."[27]

The executive, i.e., the President, exercises control over administrative policy through the selection of agency heads and Office of Management and Budget ["OMB"] review of proposed rules. The judiciary oversees administrative rulemaking process through judicial interpretations of constitutional requirements and statutory grants of authority.

A. APA Rulemaking

The APA permits two forms of rulemaking: formal and informal.[28] Formal rulemaking requires a trial-like process, which is not well-suited to the development of most rules. Informal rulemaking is used more frequently. In informal rulemaking, the agency gives public notice of the proposed rule followed by an opportunity for comment, i.e., "notice and comment" rulemaking.[29] Some agencies have adopted a "hybrid" process that allows both written comments and oral testimony.[30] An agency may forgo notice and comment if the agency determines that it is impracticable,

[27] Cuéllar, *supra* note 25, at 422.

[28] *See generally* 5 U.S.C. § 553(b) (2012) (providing for notice and comment rulemaking, except where otherwise required by statute). *See also* KOCH, *supra* note 21, at § 4.11. Formal rulemaking requires a trial-like proceeding during which the rule is made in an adjudicatory manner. Rulemaking involving many parties quickly becomes cumbersome in a formal rulemaking setting.

[29] 5 U.S.C. § 553(b) (2012).

[30] KERWIN & FURLONG, *supra* note 7, at 280–81; KOCH, *supra* note 21, at § 4.35 (discussing the judicial and statutory moves to make a hybrid rulemaking form the norm; also discussing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1982)). In fact, many agencies had already adopted such rulemaking procedures prior to enactment of the APA. The APA was intended to create consistency across agencies.

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unnecessary or contrary to public policy to allow notice, creating good cause to hasten the effective date of the regulation.[31]

1. Issuance of a Proposed Regulation

Most agency rulemaking is conducted using notice and comment. Informal rulemaking often begins when the agency publishes in the *Federal Register* two items. All proposals have a preamble explaining the agency's reasons for the rulemaking. The second item depends on the approach the agency is taking. In some cases, agencies use a notice of proposed rule ["ANPR"] setting out the parameters for the intended rule. This is an invitation for participation in the development of a rule. In other cases a proposed rule will be published, indicating that it has considered the issues and determined what the rule should look like, subject to revisions based on the comments received.[32]

Although the notice and comment ensures an opportunity for public participation in the process before the rule takes effect, the agency is not required to consult with interested parties in crafting a proposed rule. The way agencies develop rules is something of a black box. Commentators has observed that "[W]e still know little about precisely how agencies respond to their political context when they write these rules, or how the notice and comment process in particular affects how agencies use their delegated powers."[33]

There are three categories regulations: legislative, interpretive, and procedural.[34] A legislative regulation is written pursuant to express

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[31] 5 U.S.C. § 553(b)(B) (2012). Jifry v. F.A.A., 370 F.3d 1174, 1179 (D.C. Cir. 2004) (noting that the exception "is to be 'narrowly construed and only reluctantly countenanced.'" Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). The exception excuses notice and comment in emergency situations, Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981), or where delay could result in serious harm. *See* Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995).). An explanation of the cause must be published with the notice of the proposed regulation. 5 U.S.C. § 553(b)(B) (2012).

[32] KERWIN & FURLONG, *supra* note 7, at 53.

[33] Cuéllar, *supra* note 25, at 414.

[34] KOCH, *supra* note 21, at §§ 4:10–4:16 (3d ed.). *See also* Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 DUQ. L. REV. 323, 326 nn.4–6 (2008) (describing the purpose and nature of each type

Congressional delegation to an agency to fill explicit gaps in the law.[35] An interpretive regulation describes an agency's view of what a statute means.[36] A procedural rule governs an agency's operations, establishes and the manner in which it interacts with its constituencies.[37] Although interpretive and procedural rules may be promulgated without notice and

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of regulation). *See, e.g.*, KOCH, *supra* note 21, at § 4:11[2](a)(i) (some authors, including Charles H. Koch, Jr. use "interpretative" rather than "interpretive").

The commentators' observations are notable. First, one agency cannot regulate everything from safe air travel to agricultural policies; specialization and technical proficiency require specialized agencies. Second, there may need to be additional specialization at the administrative level, necessitating the creation of new (sub)agencies within the larger organization. Finally, increasing specialization results in a very complex government structure.

[35] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. See also KOCH, *supra* note 21, at § 4:10.

[36] United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) ("whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. '[T]he well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"' and '[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .' The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." (citations omitted)).

[37] 5 U.S.C. § 553(b)(A) (2012) (procedural regulations, as such, do not require the agency to use notice and comment rulemaking). Procedural regulations, as such, do not require the agency to use notice and comment rulemaking. 5 U.S.C. § 553(b)(A) (2012); KOCH, *supra* note 21, at § 4.12.

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comment, most agencies use the notice and comment process for the majority of their rulemaking activities.[38]

2. The Solicitation, Purpose, and Use of Comments

Proposed regulations, ANPRs, and final regulations are published in the *Federal Register* and on Regulations.gov. Both proposed regulations and ANPRs specify the manner in which comments should be submitted, which is usually in writing, although oral testimony is sometimes permitted. The announcements must include a deadline for the submission of comments that is at least thirty days after publication in the *Federal Register*.[39]

Comments are intended to provide the agency with additional information, permit drafters to consider the effects from a different perspective, or otherwise inform the agency about the rule and its effects. Such comments range in sophistication, which will be addressed in the next section.

When an agency has proceeded directly to the publication of the proposed rule, it eliminates this first avenue of public comment. The agency then considers "relevant matter presented."[40] However, the agency reviews the comments after a rule has already solidified into a proposed form.[41] After comments are received, the agency can revise and republish, revise and finalize, or finalize as drafted.[42] The agency must explain how it addressed the comments.[43] This explanation is usually included in the preamble to the final rules in the form of a statement of the number and

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[38] KOCH, *supra* note 21, at § 4.10. Absent an emergency, even temporary regulations are not to become effective for 30 days from the date of issue. *Id.*

[39] 5 U.S.C. § 553 (2012).

[40] 5 U.S.C. § 553(c) (2012).

[41] *See infra* note 42 and accompanying text.

[42] Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982).

[43] KOCH, *supra* note 21, at § 4.10. Case law requires that the agency include a concise statement responding to objections and suggestions. *Id.* However, Professors Kerwin and Furlong, noting the virtual absence of direction in the APA, question what the agency must really do with comments. KERWIN & FURLONG, *supra* note 7, at 67. Case law requires that the agency include a concise statement responding to objections and suggestions.

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quality of comments the agency received, a description of the comments received, and an explanation of the changes made or not made in response to the comments.[44]

When the comment period has closed for an ANPR, the agency reviews the comments, develops a proposed rule, publishes the rule—along with a preamble explaining the need for the rule and the authority for the agency to write it—and requests comments on the proposed rule. The ANPR is not used for many rulemakings. When there is no ANPR, an agency begins the rulemaking process with the publication of proposed rules without prior announcement.[45]

When necessary, the agency may use a temporary regulation to provide guidance while a permanent regulation is developed. Professor Michael Asimow observed that once a temporary regulation became effective, administrative staff might be more invested in the rule and less inclined to make changes in the final regulations.[46] Treasury has used temporary regulations with some frequency. Professor Asimow reported that "Some present and former Treasury and Service officials, when pressed acknowledged that they might be less willing, in marginal cases, to make changes in rules that were already in effect as opposed to proposed rules."[47] He also noted that tax professionals had that same perception.[48] Thus, one may wonder whether this same feeling exists with respect to proposed regulations.

The number of comments received on a proposed regulation varies from zero to hundreds of thousands.[49] The number of comments received

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[44] KERWIN & FURLONG, *supra* note 7, at 67; *cf.* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1363 (2011) ("Agencies similarly seem unmoved even when the volume of comments is very large. . . . Very frequently a notice of final rule will note the filing of large numbers of public comments, but will pass over those comments lightly, saving detailed responses for more sophisticated or technical comments.").

[45] 5 U.S.C. § 551(5) (2012) (rulemaking is "agency process for formulating, amending, or repealing a rule").

[46] Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 367 (1991).

[47] *Id.* at 367 n.107 (1991).

[48] *Id.*

[49] Mendelson, *supra* note 44, at 1345.

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on a particular notice may be disproportional to the degree of controversy over the issue, perhaps in part because of information asymmetry; unorganized and unaffiliated persons are less likely to learn of potential rules.[50] Well-funded interests may more easily monitor the *Federal Register*, increasing information asymmetry.[51] Well-funded businesses, groups, and other organizations may hire someone to prepare thoroughly researched, technical comments; comments that display a high level of sophistication. In other words, the lobbying about a particular law moves from the politician's office to the agency.[52] Such access is often limited to high net-worth individuals, businesses, and interest organizations as a result of access to information, coordination, and economic resources. These organizations are often referred to as "special interests." However, interest groups do not resolve all concerns relating to the dissemination of information to the public because an interest group and its membership may not have identical beliefs or motivations, which may not be apparent on the basis of the submission of form letter comments.[53]

In comparison, lay comments may appear to be less sophisticated and poorly structured, but they often raise relevant issues and concerns.[54] Other smaller, less well-funded or organized interests, but who share a common interest—"affinity groups"—may also monitor regulations and educate their members. In addition, when a proposed rule is a far-reaching rule, educating or otherwise informing all affected persons or groups is difficult.[55] Despite the difficulties associated with broad education, it is essential to the maintenance of participation in the administrative process.

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[50] Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 511–12 (1969).

[51] *Id.* at 511 (exploring mechanisms to permit the poor to participate in a meaningful way, as do well-funded interest groups).

[52] This might be a point at which concern for the process becomes about the delegation and subsequent processes, as many of us feel at least a little uneasy with the transfer of legislative power to agencies. However, because of the sunshine or open-government acts, there are a means to address the sources of concern. This is, however, not the place to explore that particular issue.

[53] Cuéllar, *supra* note 25, at 472.

[54] *Id.* at 460–61.

[55] *But cf. id.* at 460–62, 481 (presenting empirical evidence demonstrating that lay comments frequently included comments that were both legally relevant and worthy of consideration).

So many issues are addressed exclusively or nearly exclusively by administrative agencies, effectively excluding many people from the process, and leaving them with no meaningful voice in governance.

The number of comments received is often not the true measure of interest. The receipt of a significant number of comments may reflect something more than strong sentiment about the proposed rule; it may even reflect wider dissemination of information about the rulemaking.[56] Low response rates may reflect the impracticability of the individual members of the public remaining abreast of pending regulations.[57] Institutional commitment is required to identify affected parties and educate them on the issue as well as the process for participation.

Administrative agencies, Congress, and the courts struggle to engage the public in the rulemaking process more fully.[58] Scholars have broadly explored the paucity of public participation in, and knowledge of, the rulemaking processes relating to labor, environmental protection, and even food safety. President Barak Obama issued Executive Order 13563, addressing the importance of public involvement, stating that the regulatory system "must allow for public participation and an open exchange of ideas."[59]

Although many agencies, including the IRS, engage in public education efforts, additional education campaigns targeted at the affected groups could be used to alert those affected about pending regulation. Education campaigns could involve notices supplied to other agencies that work with the affected group; or stuffer notices to accompany other information. Indeed, if approached creatively, effective and relatively

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[56] *See, e.g.*, Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. L. REV. 173, 174 (1997) ("Administrative law has somewhat of a fetish for public participation in agency decisionmaking."); Cuéllar, *supra* note 25, at 470 (Library of Congress issued rules affecting millions and received twenty comments).

[57] Bonfield, *supra* note 50, at 518.

[58] KOCH, *supra* note 21, at § 4:33, at 353 (discussing the desirability of public participation in the rulemaking process and noting that at least one scholar, Jim Rossi, has questioned whether such broad participation will lead to the best rule); Rossi, *supra* note 56.

[59] Proclamation No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

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inexpensive education campaigns should be possible. Efforts to increase public participation in the rulemaking process have had mixed success.[60]

Moreover, some comments lack concrete suggestions, are unsophisticated, or fail to directly address the issues in the proposed regulations.[61] For example, when an agency receives a large number of form letters, the letters tend to provide little information about the consequences or the proposed rule or provide alternative approaches. Professor Mariano-Florentino Cuéllar observed that:

> Layperson comments sometimes reflect simple form letters, and sometimes appear to indicate quite different rhetorical strategies and concerns about issues. The level of sophistication of participants in the notice and comment process can vary considerably (both within a regulatory proceeding and across regulatory domains), and so can the agency's apparent willingness to make changes in its regulations following public input.[62]

These observations led Professor Cuéllar to the following analysis and conclusion:

> Participation under existing procedures is driven by the demands of people who figure out, on their own or through prodding from organized interests, that they have something at stake when a regulation is written. Even though agencies have both the incentive and the opportunity to anticipate political reactions to their regulations, the notice and comment process is not treated as a charade.[63]

Some responses may reflect frustration with the government and more than displeasure with the proposed rule. Moreover, large numbers of "comments" may make it difficult for the agency to even identify those

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[60] Public participation is not universally seen as beneficial. Rossi, *supra* note 56, at 174 ("Administrative law has somewhat of a fetish for public participation in agency decisionmaking.").

[61] *See generally* Cuéllar, *supra* note 25, at 435, 443 (noting that over 70 percent of the comments received on the Financial Crimes Enforcement Network regulations that Treasury issued pursuant to Patriot Act § 314, and those comments were "tremendously unsophisticated," and "angry and exasperated" by the intrusion into banking privacy that would result from the proposed rule).

[62] Cuéllar, *supra* note 25, at 461.

[63] *Id.* at 462–63.

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comments that are relevant.[64] However, that sends its own message, even as it may block other participants' messages.

Exploring potential means for increased participation, Professor Perritt concluded that:

> Using negotiations to prepare a proposed rule, and then allowing notice and comment rulemaking . . . is a sound approach with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of complaints by nonparticipants in the negotiations that they were denied a fair opportunity to influence the content of the rule.

The actual mitigation may remain limited with respect to rules affecting populations that have traditionally suffered from lack of knowledge and information asymmetries. Relatively few comments in a system in which the opportunity to comment is the primary means by which the administrative rulemaking process is democratized, may raise concerns about the legitimacy of the resulting rules.[65]

Meaningful participation in the process of developing a rule is important for interested parties to exercise their rights.[66] Notwithstanding the APA's presumption that judicial review is available following final agency action,[67] the courts must afford an agency great deference. Great deference to agency action may mean, that there will be no other opportunity for adversely affected populations to effectively be heard. In most cases, courts determine whether the regulation is arbitrary or

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[64] E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992) ("It is literally impossible for an agency to conduct a dialogue among the 10,000 or so separate parties who submit separate comments in some Environmental Protection (EPA) rulemakings.").

[65] Book, *supra* note 8, at 525 (discussing the effects of rulemaking, and concluding that a new rule "also has systemic effects regarding the overall integrity of the tax system and the public's perception of the tax system and government overall."); KERWIN & FURLONG, *supra* note 7, at 169; Harter, *supra* note 42, at 7.

[66] Bonfield, *supra* note 50.

[67] 5 U.S.C. § 701 *et seq.* (2012).

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capricious.[68] Interpretive and procedural regulations are reviewed to determine their reasonableness.[69] Earlier participation is essential.

Professor Cuéllar concludes that "[w]hatever one thinks about the source of the[] comments or the non-commenting public's apathy, though, it is simply inaccurate to suggest that individual members of the public are—across the board—apathetic about regulatory policy."[70] Professor Cuéllar notes that unsophisticated lay comments may simply reflect the difficulty that many individuals face with respect to any form of participation in government.[71]

3. Agency Response to Comments

Once the comment period closes, the agency reviews the comments received. Scholars disagree about the effect that notice and comment has on the process. Some commentators suggest that all comments may influence the final content of the rule.[72] Professor Cuéllar, reviewed three randomly selected regulatory projects, each from a different agency, and concluded that each of the final regulations demonstrated agency consideration of comments from both interest group and laypersons.[73] Two prominent administrative law scholars have argued that "notice and comment often functions as a charade,"[74] resulting in "a forum for competition among interest groups, rather than as a means to further the public interest."[75]

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[68] KOCH, *supra* note 21, at § 4:10.

[69] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (limiting a court's authority to dictate internal agency procedures and the procedures for issuing guidance documents); KOCH, *supra* note 21, at § 4:15[1].

[70] Cuéllar, *supra* note 25, at 470.

[71] *Id.*

[72] *Id.* at 426, 434.

[73] *Id.* Cuéllar admits that one weakness in this study its failure to distinguish between comments from individuals and comments from organized interests. *Id.* at 434. The data did, however, distinguish between form letters and other comments, with form letters defined as more than three comments using exactly the same language. Form comments likely indicate that an interest group has undertaken an education campaign.

[74] David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (2001).

[75] Cuéllar, *supra* note 25, at 424.

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An agency is not required to change its proposed rules to reflect comments received, it need only give them due consideration. Often an agency simply notes the substance of the comments received and explains the reason the comments did not result in any changes. This is often done in the preamble to the final regulation. Professors Kerwin and Furlong note that "[i]f public comments raise significant issues related to statutory objectives or requirements, the agency can ignore them only at its peril."[76] Nonetheless, the agency response may only acknowledge "the filing of large numbers of public comments, but will pass over those comments lightly, saving detailed responses for more sophisticated or technical comments."[77]

Before addressing the possible use of more collaborative processes with respect to Treasury regulations, it is helpful to create a foundation on which to consider the history of collaborative rulemaking. The next section explains the basic framework for collaborative rulemaking, including other forms of rulemaking that emanate from the core idea of using constituents in rule design.

4. Barriers to Information Access

In recent years, public participation in the regulatory process has been made easier by the Internet. Rulemaking information is published at www.regulations.gov. Regulations.gov is intended to provide "one stop shopping" for anyone interested in pending regulatory projects, making it easier and less expensive to learn about proposed regulations, submit a comment, and follow the process through to finality. Participation is still not cost-free as potentially interested parties must expend time or pay someone else to learn of a proposed rule and then make a cogent, logical explanation of their position. The comments receiving the greatest attention are often those that are technical in nature, with "agencies generally appear[ing] to be impatient with and unresponsive to value-focused commenting."[78]

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[76] KERWIN & FURLONG, *supra* note 7, at 174.

[77] Mendelson, *supra* note 44, at 1363.

[78] *Id.* at 1367.

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Barriers to information access limit participation in the rulemaking process. Interested or affected parties may not learn of a proposed regulation in a timely fashion even with the use of regulations.gov because of resource limitations; determining the nature of all proposed regulations is a herculean task. Moreover, even after learning of a proposed rule, an interested party may have difficulty drafting the well-written, cogent comments that are likely to garner agency attention. Some observers have suggested that laypersons possess insufficient knowledge to effectively comment on risk related regulatory issues.[79]

Broad participation is often difficult, time consuming, and costly.[80] Easy access to information on pending regulations is necessary to maintain the legitimacy of the process.[81] Intentional efforts to notify affected groups before, or even after, a proposed rule is published for notice and comment may give regulated parties a better opportunity to participate in the regulatory process.[82] Where feasible, creating additional or alternative means for participation could facilitate participation and access to information about the regulatory process. Town-halls in areas where there is significant impact, virtual town-halls, and field studies or polls are ways in which an agency might facilitate and encourage participation and access.[83]

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[79] Cuéllar, *supra* note 25, at 426 (citing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 49–50 (1993)).

[80] Bonfield, *supra* note 50, at 512. However, in some cases the degree of public participation is astonishingly high. Mendelson, *supra* note 44, at 1345.

[81] Gellhorn, *supra* note 4, at 369 ("The need for, and desirability of, public participation in [notice-and-comment rulemaking] is axiomatic."). It is not universally agreed that public participation is necessarily beneficial. Rossi, *supra* note 56, at 174 ("Administrative law has somewhat of a fetish for public participation in agency decisionmaking [sic]").

[82] *See, e.g.*, Bonfield, *supra* note 50, at 525 (advocating for the creation of a "well-financed clearinghouse-coordinator organization" and an independent poor people's counsel).

[83] *Id.* at 525 (encouraging legislation to permit agencies to reimburse "transportation, meal, or babysitting costs" if incurred to permit testimony or other participation in the rulemaking process).

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B. Collaborative Rulemaking

1. Introduction

Time-consuming litigation and stalled efforts at rulemaking produced concerns that agency rulemaking had become "ossified."[84] In the late 1970's, John T. Dunlop, former Secretary of Labor and leader of President Nixon's program on wage and price controls, identified numerous problems with the traditional rulemaking process.[85] Proponents of change believed that too many rules stalled or experienced substantial delays in implementation because of frequent judicial challenges, which might be reduced by increasing public participation in the rulemaking process.[86] Moreover, "[t]he relative insularity of a process with dramatic impacts on society stands at odds with ordinary notions of democratic policy making."[87] Dunlop urged that "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations,"[88] suggesting the use of a model closer to collective bargaining. Concerns raised about traditional "command and control" rulemaking include the degree of agency discretion[89] and the possibility traditional rulemaking could "undermine problem solving and reward adversarialism."[90] In addition, under traditional command and control regulation, available information may be underutilized.[91]

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[84] Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 700 (2007) ("There is a general consensus that the notice and comment rulemaking process for legislative rules has become 'ossified' over the last few decades. . . ."); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 7 (1995); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1631–33 (1986); Harter, *supra* note 42. *See also* United States v. Mead Corp., 533 U.S. 218, 248–49 (Scalia, J., dissenting) (asserting that the Supreme Court's interpretation of *Chevron* and application of *Skidmore* would result in the ossification of the law); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) ("[d]uring the last fifteen years the rulemaking process has become increasingly rigid and burdensome. An assortment of analytical requirements have been imposed on the simple rulemaking model, and evolving judicial doctrines have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny."); *but cf.* Yackee & Yackee, *supra* note 21, at 1421–22 (2012) ("evidence that ossification is either a serious or widespread problem is mixed and relatively weak. Even in the allegedly ossified era, federal agencies remain able to propose and promulgate historically large numbers of regulations, and to do so relatively quickly.").

[85] John T. Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 72 (1976).

[86] *Cf.* Coglianese, *The Internet and Citizen Participation*, *supra* note 21, at 35 ("In the end, it is quite possible that some applications of information technology should be rejected precisely because

New, more collaborative rulemaking approaches were conceived to reinvigorate the process. Collaborative rulemaking describes a wide range of approaches to regulation undertaken in consultation between the regulator and the regulated.[92] These experiments came out of the idea that "If interested persons can be brought together and made to work out a rule, the process is more efficient, effective and sensitive to all interests."[93] Collaborative governance,[94] Reg-Neg,[95] negotiated settlement,[96] mediation,

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they enable *too much* transparency or public involvement in administrative rulemaking.") (emphasis added); *but see* Elliott, *supra* note 64, at 1490, 1492 ("Notice-and-comment does not always provide genuine public participation in legislative rulemaking; it is useful primarily as a record-making device and is generally employed when a rule is in near-final form." Observing that "[t]he primary function of the notice-and comment rulemaking process in our system has shifted since the enactment of the Administrative Procedure Act (APA) in 1946. What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review"). Professor Elliott then likens the notice and comment procedures to Japanese Kabuki theatre and human passions—perhaps an apt analogy. *Id.*

[87] Coglianese, *The Internet and Citizen Participation*, *supra* note 21, at 34.

[88] Dunlop, *supra* note 85, at 72.

[89] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 10 (1997).

[90] *Id.* at 11 (discussing concerns that parties become reactive, and therefore potentially critical under rules promulgated under traditional rulemaking processes).

[91] *Id.* at 12.

[92] Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present and Future*, 55 DUKE L.J. 943 (2006) [hereinafter Coglianese, *Citizen Participation in Rulemaking*]; Coglianese, *The Internet and Citizen Participation*, *supra* note 21, at 33; Freeman, *supra* note 89. Although these two concepts are not entirely the same, their foundational concepts are the same and the terms are used here interchangeably.

[93] KOCH, *supra* note 21, at § 4:36.

[94] Coglianese, *Citizen Participation in Rulemaking*, *supra* note 92; Freeman, *supra* note 89.

[95] Harter, *supra* note 42. The use of negotiated rulemaking has been increasing for more than 30 years. It developed as a response to the increasingly litigious character of administrative regulation. Perritt, *supra* note 84, at 1627. Since 1990, Federal law has encouraged Federal agencies to use negotiated rulemaking "when it enhances the informal rulemaking process." 5 U.S.C. § 561 (2012). In 1990, Congress passed the Negotiated Rulemaking Act of 1990. Pub. L. No. 101-648, § 3(a), § 581, 104 Stat. 4969, 4970, *amended by* Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, § 3(a)(2), 104 Stat. 944 (1992).

[96] Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001).

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and other dispute resolution techniques can be used during rulemaking to obtain better regulatory results (including reduced litigation), improved compliance, and greater shared understanding of the issues.

Re-envisioning the rulemaking process, Professor E. Donald Elliott reasoned that the real situs of rulemaking occurs before the notice and comment process begins. Professor Elliott observed that the process is much of the problem with modern rulemaking, "Because of the need to create a record, real public participation—the kind of back and forth dialogue in which minds (and rules) are really changed—primarily takes place well in advance of a notice of proposed rulemaking appearing in the *Federal Register*."[97] Professor Elliott identifies several mechanisms that could be used to attain meaningful participation, on a spectrum from very informal meetings and roundtable discussions with stakeholders, to very formal, including advisory committees and negotiated rulemaking.[98]

2. Collaborative Rulemaking Models in General

As agencies began to reconceive the rulemaking paradigm, collaborative rulemaking approaches developed. Advocates for change noted that

> regulatory program decisions are made in a political environment. . . . In developing and pursuing a regulatory strategy within this statutory framework, an administrator is unlikely to pursue a strategy that he knows will enrage those groups most influential in the Congress, with the press, or with his superiors in the executive branch.[99]

Consonant with the name, collaborative rulemaking is intended to increase the likelihood that promulgated rules are effective in addressing the issue being regulated, and in a manner that reflects concern for the burdens imposed. However, this is not a miracle cure for all the ills that plague the rulemaking process, and collaborative processes are not suitable for all types of regulations.

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[97] Elliott, *supra* note 64, at 1495.

[98] *Id.* at 1492–93. To increase participation by the poor, Professor Arthur Earl Bonfield recommended the use of town hall style meetings, field surveys, and reimbursement of costs incurred to participate. Bonfield, *supra* note 50, at 524–25.

[99] Perritt, *supra* note 84, at 1636.

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Collaborative rulemaking has become an umbrella term, covering a variety of nontraditional approaches to rulemaking, including negotiated Reg-Neg, advisory committees, mediation, and other forms of participatory regulation, including the "Agency Participation Model" and the "Agency Oversight Model."[100] Reg-Neg, is the most firmly established of these approaches.

Collaborative rulemaking projects are most successful with early identification of interested constituencies, including both groups that will benefit from the new rule and groups that will be burdened by the rule. It also is necessary to determine whether it is possible to form a reasonably sized group or committee that will reflect all of the interests.[101] Ideally, all affected constituencies will be represented in a collaborative process. Because of the inclusive nature of collaboration, applying the concept in rulemaking may provide minority interests with a more meaningful opportunity to voice concerns and make recommendations during the rule development stage.[102]

Professor Perritt observed that "[m]uch governmental regulation is designed to protect loosely scattered, disorganized interests held by individuals—such as those of consumers or persons concerned with environmental quality."[103] Administrative law practitioners and scholars have long struggled to develop means to increase the involvement of the less powerful or indivuated interests. Professor Elliott notes that "[w]hat all these new techniques for 're-inventing rulemaking' have in common is their use of *representatives* as a surrogate for participation by all interested members of the public."[104] Professor Stewart explains that in traditional rulemaking, "[t]he only leverage which such disorganized interests often have (apart from seeking champions and publicity in the legislature) is to

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[100] *Id.* at 1712.

[101] *Id.* at 1636.

[102] Although this will not be discussed in this article, there is certainly something important about the manner in which representatives of various interests are chosen, as well as about when there are too many interests to use a collaborative approach to rulemaking.

[103] Perritt, *supra* note 84, at 1634 (quoting Richard B. Stewart, in a letter to the author dated Mar. 10, 1976).

[104] Elliott, *supra* note 64, at 1495.

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attempt to goad the agency into action on their behalf and, failing administrative protection, recourse to the judiciary."[105]

Greater input from nontraditional sources may result in more effective rules that represent compromise between the agency and its constituencies and are less likely to suffer judicial challenge.[106] Professor Philip Harter advocated Reg-Neg to cure "The malaise of administrative law, which has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties."[107]

Collaborative rulemaking is not well suited to all rulemaking efforts. In many instances, collaborative rulemaking is not practical because there are too many stakeholders or collaboration would require a disproportionate amount of resources relative to the issue on which the rule is to address. For example, adjusting the applicable federal interest rate is a mechanical function that would not justify the use of a committee.[108]

Situations in which a balanced rulemaking committee is not possible, the use of a nontraditional approach may cause the agency to appear to be "captured."[109] Not all rules with varying rules are ideal candidates for collaborative rulemaking. Rulemaking projects that have many interested parties that cannot be easily separated into representative interest groups,

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[105] Perritt, *supra* note 84, at 1634 (quoting Richard B. Stewart, in a letter to the author dated Mar. 10, 1976). This struggle may be shifted, although not entirely eliminated when an agency uses collaborative approaches because some rules apply broadly enough that it would be simply impossible to include the voice of even the farthest removed individual or entity.

[106] *See generally* Rossi, *supra* note 56, at 226 (noting that emotional appeals and form letters have been observed to risk the possibility that agency decision makers will suffer information overload); *but see* Cuéllar, *supra* note 25, at 421 (discussing the fact that "existing law implied that regulators cannot ignore all the comments they receive," and that there is some evidence that postcard campaigns to legislators, although they find the campaigns undesirable, sometimes take action as a result).

[107] Harter, *supra* note 42, at 113.

[108] This is currently done in notices published in the Internal Revenue Bulletin ["IRB"]. These adjustments to the applicable federal rate of interest may not constitute a "rule." The question of which Treasury or IRS guidance constitute agency rules is beyond the scope of this article. The question has been explored in some depth by Professor Kristen E. Hickman in *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007) [hereinafter Hickman, *Coloring Outside the Lines*].

[109] Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 489 (2000) (noting concerns about co-option of the agency and the need for the agency not to simply defer to the committee).

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collaborative rulemaking may be difficult or impossible. Moreover, the assertion that collaborative rulemaking may save time or reduce litigation likely does not apply in instances where the parties cannot reach agreement because their interests are too disparate. In some cases, the likelihood that no agreement can be reached is clear from the outset. In instances where the agency and the stakeholders are not going to be able to agree or the stakeholders cannot agree among themselves, collaborative rulemaking is unlikely to produce identifiable benefits.

Even when collaboration does not result in the development of a new rule, there may be benefits to using collaborative rulemaking approaches and bringing more of the parties to the table. Indeed, Professor Henry H. Perritt, Jr. suggests that one of the problems with the traditional model of administrative law is that it has not developed fine enough dispute resolution tools to adequately address disputes arising out of divergent stakeholder interests.[110] In this case, negotiations or mediations can provide useful information even if agreement is not ultimately achieved, as greater understanding of each party's position and concerns become known.

3. Negotiated Rulemaking

The earliest idea for formal use of collaboration in the rulemaking process, Reg-Neg, was advocated by Professor Philip J. Harter.[111] In broad outline, this approach brings the stakeholders together with the agency before a proposed rule is released.[112] Professor Harter suggested that "[a] regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack."[113] To be effective, the parties involved in

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[110] Perritt, *supra* note 84, at 1632 (noting that the political process and private contract negotiations allows participants in those contexts greater flexibility than does administrative law allow with respect to disputes between stakeholders about their interest and its representation in the administrative rulemaking process).

[111] *Id.* at 1628 (referring to Harter, *supra* note 42, at 1).

[112] Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 390 (2001) (citing the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570 (2012) [hereinafter Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*], and the act that reauthorized it, the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873–74 (1996)).

[113] Harter, *supra* note 42, at 7.

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Reg-Neg there must be readily identifiable parties with reasonably well-defined positions on the issue and a collective desire to make progress. In addition, to ensure that the result is a well-crafted rule in everyone's best interest, it is critical that the agency makes clear throughout the process that the regulation will be issued by the agency, so ultimately it controls the result.[114]

In an effort to develop better rules, more easily implemented and subject to less regulation, agencies began creating advisory committees. These advisory committees were subject to little oversight and had the potential to create agency capture. To maximize the benefits and soften the possible detrimental effects, Congress enacted legislation formalizing the creation and use of advisory committees in the Federal Advisory Committees Act ["FACA"].[115] Like the APA itself, FACA provides a framework under which advisory committees are to be formed, but does not prescribe the process so long as it is transparent and public. FACA legislation permits and encourages collaboration between an administrative agency and its stakeholders, speeds the promulgation of regulations, and reduces the number of challenges to the regulations implemented.[116]

Reg-Neg has at least two potential benefits: first, a negotiated approach should reduce the time required to promulgate a final regulation, and second, such a rule should less likely be the target of litigation.[117]

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[114] Seidenfeld, *supra* note 109, at 458 ("The collaborative process is most promising, however, if used as a tool to guide agency discretion, rather than as an alternative mechanism to promulgate regulations backed by the coercive power of the state."). *But see* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 194–96 (2009).

[115] Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1–15 (2012)).

[116] *But see* Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, *supra* note 112, at 386 ("[M]y research demonstrates all too clearly that negotiated rulemaking has failed to meet these two prominent goals. It neither saves time nor reduces litigation." (citing prior research, Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1278–1309 (1997)) [hereinafter Coglianese, *Assessing Consensus*].

[117] KOCH, *supra* note 21, at § 4:36. There are a number of scholars who have observed that the practice of negotiated rulemaking may not live up to its potential. *Id.* (citing Coglianese, *Assessing Consensus*, *supra* note 116, at 1255); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997); Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015 (2007)).

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Observing the benefits of negotiated rulemaking, Congress passed the Negotiated Rulemaking Act,[118] to formally approve of and encourage the use of the process, as well as to establish a framework in which Reg-Neg could develop.

Some agencies have proactively incorporated collaboration in their rulemaking process.[119] Given the urgency and controversial nature of some of its programs, it is not surprising that the Environmental Protection Agency ("EPA") was an early adopter of Reg-Neg.[120] In an effort to reduce the time required to implement new rules and reduce litigation, the EPA began using Reg-Neg when the idea was in its infancy, and has done so for more than 30 years.[121] Experiencing benefits from increased participation earlier in the rulemaking process, the EPA began asking for constituents to suggest areas in which rules were needed and would benefit from this new form.[122]

a. The Process

The decision to use Reg-Neg is within the discretion of the agency.[123] The makeup and operation of the committee is expected to comply with FACA,[124] except as otherwise provided in the Negotiated Rulemaking Act

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[118] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 3(a), § 581, 104 Stat. 4969, 4970 (1990), *amended by* Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, § 3(a)(2), 106 Stat. 944, 944 (1992).

[119] Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 111 (1998) (discussing negotiated rulemaking as one theory of regulation).

[120] The EPA is not the only agency that has successfully used collaborative rulemaking tools. The Department of Labor and Occupational Safety and Health Agency ["OSHA"] along with numerous other federal administrative agencies also have successfully used nontraditional rulemaking approaches. *See, e.g.*, Perritt, *supra* note 84.

[121] Harter, *supra* note 42, at 32.

[122] Perritt, *supra* note 84, at 1689. This is similar to the approach Treasury and the IRS use to develop each year's priority guidance plan.

[123] 5 U.S.C. § 564(a) (2012).

[124] Federal Advisory Committee Act, Pub. L. No. 92-463, § 4, 86 Stat. 770, 771 (1972) (codified as amended at 5 U.S.C. app. 2 (2012)).

of 1990.[125] Under the Negotiated Rulemaking Act, an agency is expected to form a balanced committee that includes regulated entities, citizen groups, and trade associations.[126] To be most effective, inclusion of all affected parties in necessary.

Reg-Neg can be useful to settle polycentric regulatory challenges.[127] However, negotiated rulemaking is not the ideal solution to all problems, and will not work in every case.[128] One colorful observation of interests and rulemaking explains "[T]he 'hot tub' theory is not true: people do not get together to resolve disputes with openness and reasonableness simply because the process is labeled nonadversarial."[129] Thus, all participants, including the agency, must understand how the process works so that they will maintain reasonable expectations of the scope and effect of the outcome.

Under the Negotiated Rulemaking Act, an agency is expected to consider the appropriateness of the process, looking at such factors as:[130]

1. The number of identifiable interests that will be significantly affected;[131]
2. The likelihood that a balanced committee, providing adequate representation of all interests, with an intent to negotiate in good faith can be formed;[132]

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[125] 5 U.S.C. §§ 565–566 (2012). *See also* Perritt, *supra* note 84, at 1629 (taking the position that the Federal Advisory Committee Act did not need to be amended to allow agency's to engage in negotiated rule making, citing as evidence the four negotiated rulemakings undertaken by the Occupational Health and Safety Agency ("OSHA"), the Federal Aviation Agency ("FAA"), and the EPA in the period between 1982 and 1986).

[126] 5 U.S.C. § 563(a) (2012).

[127] Harter, *supra* note 42, at 41–42 (citing Boyer, *Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 117 (1972)).

[128] *Id.* at 42.

[129] *Id.*

[130] 5 U.S.C. § 563(a) (2012).

[131] 5 U.S.C. § 563(a)(2) (2012).

[132] 5 U.S.C. § 563(a)(3) (2012).

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3. The likelihood that consensus can be reached within a fixed period of time;[133]
4. Whether negotiated rulemaking will delay the rulemaking process;[134]
5. Whether the agency has, and is willing to dedicate, adequate resources to a negotiated rulemaking process;[135]
6. Agency commitment to obtaining and using the negotiators as a basis for the proposed rule.[136]

Professor Perritt studied four instances in which Reg-Neg was used, each resulting in different degree of success.[137] He cautioned that "[a]n agency cannot expect to transplant automatically and without modification the pattern followed successfully by another agency, or even by itself on another issue, in another negotiation."[138] His work identifies a number of additional factors that are likely to increase the success of a negotiated rulemaking process:

1. Whether stakeholders have the opportunity to request to participate or be represented in the process through publication of a notice of the intent to undertake a regulatory negotiation;
2. The parties are conscious of the impediments created by FACA, which technically requires almost all meetings to be noticed and public, but the spirit of which should allow some nonpublic deliberation;
3. The agency is flexible with respect to the issues on which the negotiators must achieve consensus;

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[133] 5 U.S.C. § 563(a)(4) (2012).

[134] 5 U.S.C. § 563(a)(5) (2012).

[135] 5 U.S.C. § 563(a)(6) (2012).

[136] 5 U.S.C. § 563(a)(7) (2012).

[137] Perritt, *supra* note 84, at 1708–09.

[138] *Id.* at 1709.

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4. The agency participates in the negotiations, to demonstrate it is undertaking the process in good faith and to facilitate an understanding of the issues on which the participants are unable to reach consensus, but in which the parties may have "given" in their position;

5. Post-negotiation publication of the proposed rule, with a request for comments;

6. The participants are fully educated about the process and the consequences of failing to reach agreement and in what time frame;

7. Whether mediators or facilitators are to be engaged—an outside neutral is preferable, but an agency person may serve if clear protocols are established—perhaps even having the neutral receive, evaluate, and report on confidential or proprietary data.[139]

With respect to consensus, Professor Perritt suggests that "[a] possible rule of thumb is to say that a consensus has been obtained when all participants agree informally that they will not actively oppose a particular resolution of issues, though certain of their constituents might register formal opposition."[140]

Under the Negotiated Rulemaking Act, there are at least two ways that a committee can be appointed: by the agency or by a convener.[141] A convener may be an outside neutral, which Professor Perritt encourages as a means of increasing the likelihood that the negotiators will achieve consensus.

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[139] Perritt, *supra* note 84, at 1714–16 (considering the approaches taken by the agencies in the four case studies, ACUS recommendation 82-4, and ACUS recommendation 85-5 to develop guidelines for the development of regulations through negotiation).

[140] *Id.* at 1710.

[141] 5 U.S.C. § 563(b) (2012).

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b. The Case Studies

One case study explored the rulemaking process that resulted from the No Child Left Behind Act ("NCLBA"), which statutorily required the use of Reg-Neg. The NCLBA required the Department of Education ("DOE") to use negotiated rulemaking and to create a rulemaking committee on which there was an "equitable balance between representatives of parents and students and representatives of educators and education officials," to guarantee "that the views of both program beneficiaries and program providers are fairly heard and considered."[142]

In its first negotiated rulemaking under the NCLBA, there were twenty-two members on the committee, yet its makeup did not represent all of the intended stakeholder groups.[143] That is, the twenty-two representatives who were selected to be on the rulemaking committee did not satisfy the NCLBA's directive to provide an "equitable balance" between the major classes of parties involved in the provision of elementary and secondary education.[144] Professor Holley-Walker explains that "[f]ive of the seven representatives for students of 'program beneficiaries' were actually 'program providers,' such as employees of school districts. This lack of representation for program beneficiaries likely meant that their views were not expressed independently from the goals of the program providers."[145] Holley-Walker observes that "[t]he failure of the DOE to appoint to the negotiated rulemaking process independent representative for program beneficiaries is a significant failure in implementation of the Act."[146] The evidence collected in the course of litigation of the DOE process indicates that the DOE was intentionally seeking to mute the voice of the student and parent representatives.[147]

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[142] H.R. REP. NO. 107-334, at 809 (2001).

[143] Holley-Walker, *supra* note 117, at 1046.

[144] *Id.* (also explaining that the NCLBA does not require equal representation, but concluding that equitable representation had not been provided for all groups).

[145] *Id.*

[146] *Id.*

[147] *Id.* at 1046–47.

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Professor Holley-Walker opines that the DOE could not select a manageable committee without some members who represented multiple interests, because some were so widely divergent, in an effort to ensure that the committee would be able to reach *consensus*.[148] Professor Holley-Walker concludes that the requirement that a negotiated rulemaking committee reach consensus created a strong incentive that the DOE exclude from the process any views or voices that were likely to be strong and divergent from the other members of the committee.[149]

This reflects one of the challenges presented by Reg-Neg: to be legitimate all interests should be represented, but once all interests are represented it may be impossible to achieve consensus. Thus, it is important for an agency to clearly define and be flexible with respect to the issues on which consensus must be achieved, as noted by Professor Perritt.[150]

Flexibility with respect to consensus may be needed because if the agency has included representatives of all of the interests, there may be issues on which they will not reach consensus because an issue is a core part of their position. The need to include all interests and to create attainable goals is important. Indeed, Professor Holley-Walker found that litigation in this context has not included challenges to the composition of the rulemaking committee.[151] This underscores the importance of identifying key stakeholders and ensuring that their interests are represented during the rulemaking process.

In fact, not only was committee makeup not generally challenged, but litigation over negotiated rulemakings seldom included procedural challenges and instead took the second available route to judicial remedy; that is, to challenge the substantive rule created.[152] This observation related

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[148] *Id.* at 1048 (discussing the litigation twice brought by parent representatives, which was dismissed for lack of ripeness in one instance and lack of standing).

[149] Holley-Walker, *supra* note 117, at 1048.

[150] Perritt, *supra* note 84, at 1709–10.

[151] Holley-Walker, *supra* note 117, at 1052 (she noted that cases brought under NCLBA used as authority and guidance an analogy to committees created under the Federal Advisory Committee Act, under which the selection of the committee is a final agency action, making challenges to a committee's composition an act that is subject to judicial review).

[152] *Id.*

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to rules that were developed using Reg-Neg at the EPA, the OSHA, and the Federal Railroad Administration.[153] She found six other instances in which the DOE reported engaging in negotiated rulemaking, and of those a procedural challenge was made in only one case.[154] In that challenge, student loan servicers argued that the DOE had negotiated in bad faith by asserting that it would follow the consensus of the committee.[155] Legitimacy of the process is necessary because challenging a finalized rule carries a heavy burden, as the plaintiff must show that the rule is arbitrary and capricious.[156]

Professor Holly-Walker suggests two improvements to the negotiated rulemaking requirement in the NCLBA: define more clearly the stakeholders and the Congressional intended "equitable balance"; and provide a remedy for stakeholders who believe that they have been improperly excluded from the deliberative process.[157] Creation of the remedy would provide an incentive to the agency to avoid litigation over the makeup of the committee.[158] Specifically, Professor Holley-Walker recommends that there be two paths of litigation in a negotiated rulemaking situation: the first, at the time the committee is formed, allowing redress of improper committee makeup; the second, after the rule is promulgated.[159]

Professor Perritt examined several rulemakings, particularly focusing on attempts to create rules through negotiations.[160] Professor Perritt's analysis considers both successful and unsuccessful uses of negotiated rulemaking. First, the failed negotiated rulemakings included one started by OSHA in which the agency did not participate (benzene regulations) and one started by the FAA (pilot flight time and hours).[161] One key observation

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[153] *Id.*

[154] *Id.* at 1052–53.

[155] *Id.* at 1053 (citing USA Group Loan Serv. Inc. v. Riley, 82 F.3d 708, 712 (7th Cir. 1996)).

[156] *Id.* at 1052.

[157] *Id.* at 1054–55.

[158] *Id.* at 1055.

[159] *Id.* at 1056.

[160] Perritt, *supra* note 84, at 1691.

[161] *Id.*

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Professor Perritt made was the importance of agency involvement in the process.[162] He analyzed the perception of success and failure in this way: "The FAA, having participated in the negotiation sessions, had an understanding of what the parties could accept. The OSHA, not having participated, had no such understanding."[163] The strong implication from Perritt's case studies is that agency involvement is crucial to the success, actual or perceived, of the negotiated rulemaking process.[164]

The EPA's use of Reg-Neg has resulted in the successful promulgation of better regulations in many cases, and this process has reduced the number of legal challenges made to regulations that would otherwise be controversial.[165] In 1986, the EPA attempted to use negotiated rulemaking to develop proposed rules for farmworker protection.[166] During the negotiations, one of the representatives withdrew from the negotiations because it concluded that its interests would not be served by participation in the negotiation process.[167] As a result, the group could not come to a consensus among all interests.[168] Nonetheless, the group decided to continue, believing that it could be productive and influence the ultimate rule.[169] This is a demonstration of a more flexible view of success that may provide the agency with useful information that it otherwise would not have had.

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[162] *Id.*

[163] *Id.*

[164] Perritt, *supra* note 84, at 1691 (analyzing how the similarities and difference among the approaches selected by the agency in his case studies influenced success or failure).

[165] *See generally* Stewart, *supra* note 10, at 676 (considering possible differences in success based on focal point of the developing regulation) ("What is the relative importance of the factors in discouraging negotiated solutions? . . . Such negotiation has thus far been far more successful in local development and land use controversies than in nationwide controversies over federal regulatory standards.").

[166] Perritt, *supra* note 84, at 1686–87.

[167] *Id.*

[168] *Id.*

[169] *Id.* (the parties remaining in the negotiation were reconstituted as an advisory committee).

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As the NCLB example illustrates, such success is not guaranteed. However, the benefits other agencies have experienced make the potential cost worth incurring in some cases.

C. Balancing the Benefits and Challenges of Collaborative Rulemaking

Regardless of viewpoint, it is clear that collaborative rulemaking is not a panacea. Its advocates acknowledge that there are times when a collaborative process for rulemaking will not be appropriate. However, that also is true of all rulemaking techniques, including taking oral testimony to supplement the paper comments, simply taking written submissions, or using formal rulemaking over informal rulemaking. Too many interested stakeholders or too divergent views among the stakeholders can both create problems with Reg-Neg.[170] Other hurdles can be unsuitable subject matter, established animosity between the parties, a lack of commonality of the views within each party, and differences in negotiating style of the participants.[171] It may come down to the skill the agency representatives have in facilitating a rulemaking with one or more of these roadblocks.[172]

Attempting to reach consensus among parties with differing positions that have firmly solidified is a problem inherent in this aspect of Reg-Neg.[173] Negotiated rulemaking, as included in the NCLBA, requires that the committee reach consensus.[174] Efforts under the NCLBA demonstrate that negotiated rulemaking will not always work, but it has the potential to allow a rule to develop that addresses the concerns of diffuse stakeholder groups in a controversial area.[175] Where Reg-Neg is to be required,

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[170] *See generally* Perritt, *supra* note 84, at 1629.

[171] *Id.*

[172] *Id.*

[173] Holley-Walker, *supra* note 117, at 1050–51.

[174] *Id.* (citing Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 116 (2005)).

[175] *Id.*

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Professor Holley-Walker observes that the delegation to an agency must be clear as to purpose and intent.[176]

Even in a negotiated rulemaking, the agency must ultimately write the rule. Thus, the parties must be educated to create reasonable expectations before they begin a collaborative rulemaking process. First, the only way that all of the parties will come to the table is if each party thinks that it may benefit from participation.[177] Second, to maintain active participation in the future, the parties must understand that the fruits of the negotiation for the participants will be the opportunity to inform and influence the ultimate regulation, not control of or veto power over the form and content of the rule.[178] Success is only available when the agency participates in the negotiations and retains the right to "pull rank" and issue a regulation following the negotiations without regard to the negotiations, especially when consensus is unlikely to occur.

Moreover, collaborative rulemaking cannot succeed if the parties whose interests will be affected are unwilling to participate. The unwillingness of one interest to participate reduces the incentive for other interests and the agency. If one party is unwilling to negotiate, the agency has less assurance that it will not face a judicial challenge to a rule resulting from the agency's use of the outcome of the negotiations as opposed to developing its own rule.[179] Thus, withdrawal or nonparticipation can result in a standstill in the process that may permit one party to wield inappropriate influence over the result.

The educational value of the process, even when consensus is not reached may justify the cost. It may give the agency greater knowledge of the issues resulting from a proposed rule or a sense of the interested parties'

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[176] *Id.* at 1054 (among the improvements that she advocates are clarifying the direction to create an "equitable balance," the creation of a remedy for those who are wrongfully excluded from the rulemaking process).

[177] *See, e.g.*, Rossi, *supra* note 96; Perritt, *supra* note 84, at 1629–30 (discussing the importance of maintaining a realistic set of expectations among the parties, ensuring that the parties understand the benefits of participating in and reaching consensus during the negotiations compared with traditional processes, and engaging the use of facilitators or mediators as necessary).

[178] Perritt, *supra* note 84, at 1630.

[179] *Id.* at 1643.

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tolerance of certain alternatives.[180] The agency may gain an understanding of issues that are likely to be the subject of litigation. Thus, it is possible that an apparently failed effort at collaboration may still be worthwhile. However, repeated failure may make parties and agencies less willing to participate.

One risk is that without "careful, systematic research, conscientious agency officials have no reliable way to evaluate advocates' claims and to determine whether one set of procedures performs better than the alternatives."[181] This problem is ameliorated in negotiated rulemaking when the agency takes an active part in the process and retains ultimate control over the rule. Thoughtful selection of the approach to be used with each rule and avoidance of a "one-size fits all" mentality is critical to effective use of any rulemaking technique. Moreover, if efforts at collaborative rulemaking were required to produce a rule, it would present the agency with a choice between compromising at all costs or avoiding the use of a collaborative process for fear of deadlock and losing the valuable insight that may be provided. Setting realistic expectations of the participants before the negotiations begin generally will resolve this issue.

The next part begins a larger consideration of the use of collaborative rulemaking with respect to tax, an area where this has not been as fully examined.

III. RULEMAKING AT THE UNITED STATES TREASURY DEPARTMENT

The IRS is a bureau of the Treasury.[182] Both are administrative agencies, the heads of which are appointed by the President, subject to the advice and consent of the Senate. Although neither the Secretary of the Treasury ("Secretary") nor the Commissioner of Internal Revenue ("Commissioner") is elected to their position, their agencies both wield

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[180] *Id.* at 1687–88 (discussing the factors Harter suggested were necessary for a successful rule negotiation). *But see id.* at 1643–46.

[181] Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, *supra* note 112, at 388 (citing Cornelius M. Kerwin, *Assessing the Effects of Consensual Processes in Regulatory Programs: Methodological and Policy Issues*, 32 AM. U. L. REV. 401, 409 (1983)).

[182] I.R.C. § 7803(a); Treas. Reg. § 601.101(a).

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considerable control over the creation of tax law and the collection of revenue.

For rulemaking purposes, Congress has delegated substantial authority to the Secretary, who often delegates to the Commissioner. Indeed, the Secretary has been granted authority to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[183] As administrative agencies, their activities must comply with the APA, unless Congress provides otherwise.[184] These general requirements were discussed in Part II.

A. Significant Treasury Regulations: "There's nothing to see here, folks"[185]

Before engaging in any rulemaking, an agency must first determine that a rule is necessary, either based on the agency's judgment or specific direction from Congress to promulgate a rule on *X*. Like other agencies, the Treasury determines its priorities based on recent legislation, recent agency wins and losses in court, and recommendations from taxpayers and their representatives regarding the issues that should have priority.

"Significant regulatory actions" must comply with the requirements of not only the APA, but also the Regulatory Flexibility Act,[186] requiring that in addition to notice and comment, a cost and benefit analysis must be performed.[187] This additional requirement is triggered only when proposed

[183] I.R.C. § 7805(a).

[184] 5 U.S.C. § 551(1) (2012) (defining an agency broadly).

[185] Jeremiah Coder, *What Treasury Tax Regulations Are Rarely "Significant,"* 136 TAX NOTES 867, 867 (2012) (beginning an analysis of the approach Treasury uses when developing tax regulations).

[186] Regulatory Flexibility Act, Pub. L. No 96-354, § 3(a), 94 Stat. 1164, 1165 (1980) (codified at 5 U.S.C. § 601 *et seq.*).

[187] 5 U.S.C. § 603 (2012) (this provision of the Regulatory Flexibility Act imposes an affirmative obligation on the Treasury to transmit proposed regulations, to the Chief Counsel for Advocacy of the Small Business Administration, requiring such transmissions to include cases involving "an interpretative rule involving the internal revenue laws of the United States . . . but only to the extent that such interpretative rules impose on small entities a collection of information requirement").

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regulations are "significant regulatory actions."[188] Treasury seldom determines that new regulations are "significant regulatory actions."[189]

The Treasury and the IRS issue an annual guidance priority list.[190] This guidance priority list indicates the projects the agencies deem most important. The plan includes an invitation for "public comments and suggestion as we write guidance throughout the plan year."[191] In addition, before its priority guidance plan is adopted, the IRS issues a notice, requesting "public input" to "focus resources on guidance items that are most important to taxpayers and tax administration."[192] The 2011–12 Priority Guidance Plan indicated that it would be updated throughout the year, permitting adjustments based on legislative and judicial changes.[193] This is a routine matter. On March 8, 2012, Notice 2012-25 requested recommendations for fiscal year 2013 (the 2012–13 Priority Guidance Plan), with recommendations to be submitted by May 1, 2012.[194] However, Notice 2012-25 also acknowledges that "[a]s is the case whenever significant legislation is enacted, the Treasury Department and the Service have dedicated substantial resources during the current plan year to published guidance projects necessary to implement the provisions of the *multitude* of tax Acts that have been enacted over the past several years."[195]

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[188] 5 U.S.C. § 604 (2012).

[189] Coder, *supra* note 185, at 868.

[190] Dep't of the Treasury, *2011–12 Priority Guidance Plan* (Sept. 2, 2011), http://www.irs.gov/foia/article/0,,id=181687,00.html (last visited Sept. 4, 2012).

[191] *Id.*; *see also* 5 U.S.C. § 602(a)(1)–(3) (2012).

[192] I.R.S. Notice 2012-25, 2012-15 I.R.B. 789.

[193] Dep't of the Treasury, *supra* note 190.

[194] I.R.S. Notice, *supra* note 192, at 789 (recommendations have no required format and may include the proposed analysis or conclusion. Notice 2012-25 requests that suggestions including multiple recommendations be listed in order of priority, and, if large numbers of recommendations are included, that the recommender group the recommendations in priority of high, medium and low priority).

[195] *Id.* (emphasis added).

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This Notice recognizes that there are always fewer resources to direct toward guidance than there are demands for new guidance.[196]

The IRS has taken some steps to increase taxpayer participation in the rulemaking process. Specifically, in 2007, the IRS issued Notice 2007-17 which outlined a pilot project to solicit greater input in the drafting of regulations.[197] Under Notice 2007-17, taxpayers are permitted to present draft regulations in response to notices that the IRS intended to issue regulations.[198] Fearing that allowing the submission of draft regulations would result in backroom deals and capture by interest groups, Congress responded very negatively to this Notice.[199]

However, this may just have been a formalization of an existing practice. There is evidence that many comments about a rule or rulemaking process are not formal or written. Former Chief Counsel Donald Korb noted that "the majority of comments received, on either proposed or temporary regulations, are informal, not-for-attribution suggestions delivered over the

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[196] *Id.* The Notice identifies six factors that will be considered in determining whether the recommendations find a place on the guidance priority list:

1. Whether the recommended guidance resolves significant issues relevant to many taxpayers;
2. Whether the recommended guidance promotes sound tax administration;
3. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
4. Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;
5. Whether the Service can administer the recommended guidance on a uniform basis; and
6. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the Service.

Although this approach reasonably places greater weight on recent enactments, it does not address concerns about the backlog of Treasury Regulations from prior enactments.

[197] *Id.*

[198] *Id.*

[199] *Baucus, Grassley Oppose IRS Plan to Outsource Writing of Agency Rules*, 2007 TAX NOTES TODAY 52–32 (Mar. 15, 2007).

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phone by tax professionals who are not being paid to prepare comments and who do not particularly want their names associated with them."[200]

This statement is troubling with respect to taxpayer access to the process. Many taxpayers do not have tax professionals looking out for their interests who can whisper in the ear of the official developing the rule. Most taxpayers do not independently know IRS officials. This is perhaps one of the largest problems with administrative rulemaking as a part of a democratic process. There is a distinct shift of the law making function to politically insulated bureaucrats from elected leaders. However, it should not be suggested that elected leaders do not also face lobbying from powerful interest groups.

Opportunities to minimize the need to be connected to achieve satisfaction should be encouraged. That concern needs to be balanced against the need for some input, even if it has a relatively narrow view. Collaborative rulemaking is one method by which other views may be heard.

Choosing where to devote scarce guidance resources is an art more than a science. Especially when developing the priority list, public input will result in better outcomes.[201] Indeed, information contained in recommendations for projects to be included in the priority guidance list may provide a solid basis to determine the suitability of a project for collaboration. First, a little bit of background on Treasury rulemaking.

B. Tax Regulation at Treasury

Treasury and the IRS are among the oldest administrative agencies,[202] and they have been most resistant to the idea that it conduct rulemaking in the same manner as other administrative agencies.[203] This area has been

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[200] Asimow, *supra* note 46, at 366 n.104 (citing an unidentified Treasury official).

[201] Better in this context means results that are substantially in accord with taxpayers and their representatives' view of the areas that are most in need of guidance.

[202] The IRS' longevity includes its predecessor name, the Bureau of Internal Revenue or BIR.

[203] *See, e.g.*, Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472–502 (2013) (discussing Treasury's use of the interpretations of law to avoid applying APA requirements application of the APA and its requirements); Hickman, *Coloring Outside the Lines*, *supra* note 108, at

well covered.[204] Their reluctance to seek broad input means that they have not fully developed some of the tools available to other agencies, and Treasury could benefit from other agencies' experiences conducting collaborative rulemaking.

Through their lobbyists corporations, tobacco, oil producers and drillers, and even family farmers have always had effective, but often high priced access to Congress and the IRS.[205] Other voices may be represented, but generally only when their interests align with a larger group, such as the AARP.[206]

Although rulemaking authority is primarily delegated to the Secretary, the Secretary delegates that authority to the Assistant Secretary for Tax Policy, in the Office of Tax Policy.[207] That authority is further delegated to the IRS Office of Chief Counsel.[208] What generally follows is likely to comport with the APA. With respect to the issuance of regulations,

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1759–95 (using empirical date and Treasury practices to demonstrate the many instances in which the Treasury generally fails to apply the APA correctly); *see also* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009) [hereinafter Hickman, *IRB Guidance*]; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007). In these articles, Professor Hickman has demonstrated the need for Treasury and the IRS to bring all of its rulemaking into compliance with the APA.

[204] *See* cases cited *supra* note 203.

[205] *See, e.g.*, I.R.C. §§ 385(a) (authorizing the Treasury to develop rules to be used in the determination of debt versus equity determinations); 448(d)(5)(C) (permitting Treasury to promulgate regulations relating to the computations of income earned by certain service providers, defining what constitutes a clear reflection of income); 6015(f) (delegating the authority to prescribe the procedures to be used to determine whether a taxpayer was entitled to equitable relief in a claim made to be treated as an innocent spouse).

[206] Book, *supra* note 8.

[207] Rogovin & Korb, *supra* note 34, at 326 (2008).

[208] *Id.* at 326 n.4 and accompanying text (2008); Treas. Reg. § 601.601(a) (1987). The Office of the Assistant Secretary of Tax Policy, an office of the Treasury Department, reviews and may participate in drafting regulations, along with the Office of the Associate Chief Counsel and the Office of Chief Counsel. Treasury Order 111-01 (Mar. 16, 1981), *available at* http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to111-01.aspx (last visited Aug. 21, 2012) ("The Assistant Secretary for Tax Policy is exclusively authorized to make the final determination of the Treasury Department's position with respect to issues of tax policy arising in-connection with regulations . . . . In exercising the authority delegated . . . shall solicit and give due regard to the views of the Commissioner of Internal Revenue . . . and to the views of the General Counsel (including the Chief Counsel of the Internal Revenue Service.").

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Treasury has concluded that rules created pursuant to its general rulemaking authority under Internal Revenue Code section 7805(a) are interpretive or procedural, and only the regulations issued pursuant to specific directions from Congress are legislative.[209] As a result, Treasury takes the position that it is not required to use notice and comment rulemaking when exercising its power under Internal Revenue Code Section 7805(b), asserting that those regulations are all interpretive or procedural.[210] The distinction between "interpretive" and "legislative" regulations is far from crystal clear in any context. However, the distinction between legislative and non-legislative implied by labeling has been challenged, with one scholar noting that "the legal-regulatory tiger cannot change its stripes."[211]

Final tax regulations usually are promulgated using procedures that satisfy the APA's notice and comment requirements.[212] First, a proposed regulation is published in the *Federal Register*, along with a request for public comment.[213] In addition, the notice may include temporary regulations that are published at the same time, becoming effective

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[209] *See* Rogovin & Korb, *supra* note 34, at 326. Rogovin and Korb note that the New York State Bar Association estimated that more than 550 individual sections of the I.R.C. contain specific directions allowing the Treasury to promulgate regulations. *Id.* at n.5.

[210] *Id.* at 326 nn.5, 6 and accompanying text (2008); Hickman, *A Problem of Remedy*, *supra* note 9, at 1159 ("Treasury's actual practice is inconsistent with its claim that it complies with APA notice-and-comment requirements even when those requirements do not apply."). However, there seems to be a consensus that regulations that affirmatively direct behavior are legislative regulations. This describes any of the regulations that would seemingly fall within the ambit of 7805(a). Examples include the partnership anti-abuse regulations, Treas. Reg. § 1.702-1.

[211] Stewart, *supra* note 10, at 682.

[212] Hickman, *A Problem of Remedy*, *supra* note 9, at 1206 (2008) (discussing Treasury's statements regarding its desire for public input, but noting that "seeking public comment only after promulgating legally binding, if temporary, regulations leaves substantial room for interested parties to conclude that Treasury has made up its mind and to refrain from commenting as a result").

[213] In general, this use of notice and comment rulemaking satisfies the requirements of the APA with respect to formal rulemaking. Treas. Reg. 601.601(a)(2) (1987) (stating that "[w]here required by 5 U.S.C. § 553 and in such other instances as may be desirable, the Commissioner publishes in the Federal Register general notice of proposed rules"). *See also* Hickman, *A Problem of Remedy*, *supra* note 9. Although Treasury has often relied on the distinction between legislative regulations, which make law pursuant to a Congressional delegation of authority to do so, and interpretive regulations, which interpret the relevant statutory provisions, recent Supreme Court decisions suggest that this distinction, along with the differing standards of judicial review may be meaningless.

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immediately.[214] Although it is not common, the Treasury on occasion publishes an ANPR, describing the rulemaking project and requesting comments from affected parties.[215] It is not always clear how the Treasury determines which issues merit a Temporary Regulation, a proposed regulation, or an ANPR.[216] However, it is worth consideration that by including the affected parties early in the process, the use of an ANPR is closer to collaborative rulemaking than command and control rulemaking.

Professor Kristin E. Hickman has written extensively on the procedural failings of the Treasury's regulatory practices. She has noted that not only is it more difficult to challenge the procedure used to promulgate a regulation, but it is also possible that there are differences between challenges in tax cases and those involving other administrative agencies.[217] Professor Hickman notes that most refund and deficiency cases arrive in court after at least some kind of informal adjudication process, so that "[o]dd as it may seem, a court that invalidates a regulation on procedural grounds may nevertheless defer to the substantive interpretation of the I.R.C. contained in that regulation."[218] Professor Hickman concludes

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[214] These regulations are usually issued when there is a perceived need to act quickly either to provide guidance or to cure an unintended consequence. Some scholars have questioned the use of temporary tax regulations, arguing that such use does not fit within the APA procedures allowing an exception for good cause. Hickman, *A Problem of Remedy*, *supra* note 9, at 1161–62 (citing also other scholars and tax practitioners, including Juan Vasquez, Jr., Peter Lowey, John Coverdale, and Juan Lavilla). Specifically, observes note that the notices accompanying Temporary Treasury Regulations frequently do not state with particularity its explanation of the reasons for a temporary regulation; even then, in response to comments, the Treasury on occasion modifies the temporary regulation in response to comments, before developing a complete rule for comment or finalization. *Id.* at 1156–62.

[215] *Compare* 66 Fed. Reg. 53564 (Oct. 23, 2001) (issuing an advanced notice of proposed rulemaking that requested comments regarding guidance on the refund or credit of gas tax); *with* 66 Fed. Reg. 53565 (Oct. 23, 2001) (announcing a proposed rule relating to the availability of catch up contributions for individuals over the age of 50). *See also* Hickman, *IRB Guidance*, *supra* note 203, at 251 n.75 and accompanying text (citing as examples a number of Notices that were issued during 2007, 2008, and 2009).

[216] *See generally* Hickman, *IRB Guidance*, *supra* note 203.

[217] *See* Hickman, *A Problem of Remedy*, *supra* note 9, at 1195–98.

[218] *Id.* at 1199. Professor Hickman concludes that it is unclear what weight the court should apply to the procedurally defective regulation, but *Mead* suggests that a court should use either *Chevron* or *Skidmore* deference. *Id.* Because the review at the IRS is conducted according to "semiformal proceedings mandated by Congress and [that] are legally binding and enforceable with resort to the courts" *Chevron* deference might be warranted. *Id.* at 1199–200.

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that "it is hardly surprising that taxpayers would decide that the costs of wading into the doctrinal quagmire are simply too great."[219]

Treasury, the IRS, and tax practitioners generally have considered tax to be different than other areas. Because of the specialization and narrow focus of tax practitioners, "That state of mind considers tax to be special, different, self-contained, and self-sufficient, and thus simply not governed by the same rules that apply in other areas of law . . . . That point of view has been referred to as 'tax exceptionalism.'"[220] However, that conception of tax is slowly crumbling. In *Mayo Foundation for Medical Education and Research v. United States*,[221] the Supreme Court resolved an important question: whether tax regulations are entitled to greater deference—deference under the *National Muffler* standard—than the regulations promulgated by other agencies, which are reviewed using the *Chevron* two-step analysis. Less judicial deference after *Mayo* may incentivize the Treasury to improve the processes used to develop new tax regulations.

In *Mayo*, the Supreme Court established that tax is not its own island: "We are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly 'recogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'"[222] The Court's emphasis that there should be no special approach to tax regulation, compared with other areas of regulation, indicates that change is needed. Moreover, more inclusive procedures could increase the public's image regarding the "fairness" of the tax system.

ABA Tax and the New York State Bar Association include a variety of tax practitioners, and have a number of committees that work with the IRS and Treasury as they develop regulations and set priorities for the

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[219] *Id.* at 1200 (2008) (discussing the many hurdles taxpayers face if they choose to raise a procedural challenge to a Temporary Treasury Regulation in court during a refund or deficiency proceeding).

[220] Smith, *supra* note 15, at 1253 (citations omitted) (discussing the surprise that many tax practitioners had to the Supreme Court's opinion in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011)). The idea that tax is somehow different than other areas of the law has been referred to as "tax myopia." *See, e.g.*, *id.* at 1254.

[221] *Mayo*, 131 S. Ct. 704.

[222] *Id.* at 713.

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development of tax guidance. The same is true of AICPA and TEI, as well. Many practitioners advise average and low income taxpayers, small businesses, and not-for-profits, potentially resulting in input from the perspective those who might not individually have access. However, some tax practitioners may have limited opportunity to gain perspective outside their colleagues' and clients' interests because membership is generally limited to tax practitioners.

An outgrowth of the Treasury's trend toward compliance with the APA is an increasing call to include important stakeholders in the development of the regulatory agenda.[223] Greater, more intentional use of collaborative processes in tax rulemaking would benefit everyone. The Treasury would have access to greater insight into the problems of taxpayers and the taxpayers, at least through their representative organization, would have a voice in the process. Providing a meaningful opportunity for all views to be considered during the rulemaking process is particularly important with respect to Treasury Regulations because the Anti-Injunction Act significantly limits the opportunity that taxpayers have to obtain judicial relief.[224]

In general, insulating the country's revenue stream from the possibility that persistent challenges to the regulations will paralyze the tax collection process is a sound policy choice. This idea has been endorsed in the tax standing jurisprudence and the long-held judicial support of the Anti-Injunction Act found in Internal Revenue Code section 7421(a). Section 7421(a) precludes litigation to stop enforcement of a tax law or rule, unless one of the very narrow exceptions contained in the Anti-Injunction Act applies.[225] The restrictions on pre-enforcement review include substantial limitations on the types of tax cases for which a declaratory judgment may

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[223] Book, *supra* note 8.

[224] I.R.C. § 7421(a) (2000) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against who such tax was assessed"). Certain specific exceptions are identified, including refund suits, deficiency actions, and collection due process hearing appeals, but these sections provide little opportunity to challenge a regulation before it is applied. *Id.*

[225] *Id.*

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be sought.[226] Strategic and economic considerations often preclude investing substantial resources to challenges to the rulemaking procedure once a matter is in the posture of refund or deficiency proceedings.[227]

For example, in 2009, when Treasury issued an ANPR to regulate tax preparers' use of taxpayer information to assist the taxpayer in obtaining a refund anticipation loan from a related entity, literally thousands of comments were received.[228] Many of the comments were based on recommended text provided by their tax preparer and were intended to explain what access to the refund anticipation loans meant to their financial stability.[229] The business' motivations to solicit these comments were clear. Tax preparers offering refund anticipation loans wanted either no rule or a more favorable rule. Some commenters may have wished to aid their trusted tax advisors/preparers and followed their advice regarding submission of a comment. Alternatively, some of the commenters may have submitted the prepared comment because the submitter believed that their interests would be impeded if the rule was developed along these lines. Finally, some commenters likely had their own, personal motivation for submitting the recommended text comments, e.g., that economic activities among consenting parties should not be prohibited by government

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[226] *Id.* The Anti-Injunction Act permits a taxpayer to bring a declaratory judgment for only those types of cases permitted in the I.R.C. *See* I.R.C. §§ 7428 (permitting declaratory judgment actions to determine the status and eligibility of certain charitable organizations under I.R.C. § 501(c)(3) in the U.S. Tax Court, the district courts, and the U.S. Court of Federal Claims), 7436 (permitting declaratory judgment actions to determine the employment status of a worker for employment tax purposes), 7422 (setting forth the jurisdiction of the United States Tax Court to include certain declaratory judgment actions), 7476 (permitting declaratory judgment actions relating to qualification of certain retirement plans), 7477 (permitting declaratory judgment actions to determine the value of certain gifts), 7478 (permitting declaratory judgment actions to determine the status of certain governmental obligations), 7479 (permitting declaratory judgment actions to determine the eligibility of an estate to make installment payments pursuant to I.R.C. § 6166).

[227] *Supra* note 54.

[228] *See generally* Danshera Cords, *Targeting the Tax Gap: The Case of the RAL and the Advanced Notice of Proposed Rulemaking*, 20 STAN. L. & POL'Y REV. 119 (2009) (arguing that more information is needed before a conclusion is reached regarding RALS). The IRS ultimately received over 8,500 public submissions on this Advance Notice of Proposed Regulation. Docket IRS-2008-0005, *available at* http://www.regulations.gov/#!documentDetail;D=IRS-2008-0005-0001 (last visited Oct. 3, 2013).

[229] Docket IRS-2008-0005, *available at* http://www.regulations.gov/#!documentDetail;D=IRS-2008-0005-0001 (last visited Oct. 3, 2013). The IRS ultimately received over 8,500 public submissions on this Advance Notice of Proposed Regulation.

regulation or that they had not been given enough information from any other source to understand that this was not an "all or nothing" proposition.

As in other agencies, form comments flooding the Treasury pose an administrative burden,[230] but lay taxpayers often raise very relevant, important considerations.[231] While lay comments may not be written as eloquently as comments submitted by big firm lawyers, there is evidence that lay comments can provide important insights.[232] Moreover, there is evidence that useful and insightful comments are taken into account during the process of finalizing the rule.[233]

The limitations on challenges after a regulation becomes effective make it invaluable for taxpayers' consideration to be taken into account during the rulemaking process. More formal use of collaborative rulemaking would help to ensure that taxpayers perceive the system of tax administration as legitimate and, therefore, worthy of compliance.

IV. POSSIBILITIES FOR COLLABORATION IN TAX REGULATIONS

Many taxpayers would find it difficult to actively participate in Treasury's rulemaking programs. Ensuring that the interests of low- and middle-income taxpayers, or any smaller, less affluent, or less organized category of taxpayer for that matter, have an effective voice will legitimize the regulations adopted. The use of some form of collaborative rulemaking, such as negotiated rulemaking, could increase access to the process. In recent years some tax regulatory proposals have utilized procedures resembling the principles of collaborative governance.

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[230] Cuéllar, *supra* note 25, at 461 (in these cases, a different problem arises, which is what to do with a large number of relatively unsophisticated comments that are repetitious. Can they be disregarded, or do they represent significant support for or opposition to the proposed rule? Moreover, the repetitive responses may be an indication of democratic participation.); *see generally* Asimow, *supra* note 46, at 366 ("notice and comment procedures serve fundamental democratic purposes. An agency is making new law without direct accountability to the voters; the undemocratic power of rulemaking is alleviated by allowing the persons affected to have a say about the rules and by requiring the agency to read and respond to their comments.").

[231] *See* Cuéllar, *supra* note 25, at 435, 443 & 461.

[232] Cuéllar, *supra* note 25.

[233] *See id.* at 435, 443 & 461.

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However, there are still many ways that input could be improved both qualitatively and quantitatively. Continued efforts to include more parties with vested interests at the beginning of the regulatory process, before a proposed rule is drafted should result in better rules.[234]

Achieving greater involvement will require more affirmative outreach to interested groups at the start of the rulemaking. This will require the Treasury and the IRS to think carefully about who is affected and how to connect with them. Simply issuing a notice of proposed rulemaking or proposed regulations often will not get the attention of the parties with the greatest interest. Making the effort to involve effected parties or their representatives will further legitimate the rulemaking process with respect to the interpretation and enforcement of the Internal Revenue Code.

A. Existing Proposals

The National Taxpayer Advocate (NTA), in her 2011 Annual Report to Congress, recommended that all proposed and temporary Treasury regulation be reviewed by the NTA prior to their release and that the preamble to the published notice respond to the NTAs observations.[235] The NTA's role as an ombudsman makes her uniquely qualified both to advocate for the taxpayers' positions, and to identify groups with substantial interest in a regulatory project. Many taxpayers fall somewhere between desperately poor and wealthy enough to have the regulatory process monitored on one's behalf. Thus, someone like the NTA who is involved in the development or pre-development, charged with ensuring that notice about the rulemaking, is at least getting into the hands of those who will be affected by the new rule. The need for greater inclusion relates not just to individual taxpayers. Although there is relatively close

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[234] *But cf.* Asimow, *supra* note 46, at 353 ("Even if the interpretive rule exemption were repealed, however, it would be necessary to limit the scope of the public participation requirements. Otherwise, time-consuming notice and comment procedures would apply to every bit of interpretive guidance issued by an agency to its staff or to the public."). Professor Asimow continues on to address the difficulties inherent in drawing a clear line between legislative rules and those that are merely interpretive. *Id.* at 354.

[235] Nina E. Olson, *2011 Annual Report to Congress*, 1 TAXPAYER ADVOCATE SERV., 1, 477–78 (2011) ("Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives.").

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communication between large-firm tax attorneys and their clients, smaller-firm lawyers' clients are likely to be less willing or able to pay for continuous monitoring of the *Federal Register* and preparation of comments with respect to proposed regulations.[236] More accessible information about rulemaking is needed.

In addition, in many cases there are natural surrogates for categories of taxpayers. Comments from LITCs could represent the interests of their clients;[237] but it would be paternalistic to think that the LITCs "know what's best" for low-income taxpayers in all cases. Although affinity groups likely may be able to make comments that reflect the views of their membership, not all members will have the same interests on all matters.

In some cases it will be difficult to identify an organized group to serve as a representative of taxpayers affected by proposed regulations. Thus, different strategies may be needed in different situations. This will require the IRS to approach rulemaking more flexibly, considering separately each issue on which new rules or policies are required.

Professor Book picks up on the NTA's recommendation and proposes relatively small adjustments to the role of the NTA, including participation in the regulation drafting process, as well as on the role that low-income taxpayer clinics can play to advocate for the rights of the poor.[238] As Professor Book has recommended, encouraging and providing incentives for low-income taxpayer clinics to become involved in the regulatory process would be an excellent step in increasing the voice of low-income taxpayers.[239]

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[236] Hickman, *A Problem of Remedy*, *supra* note 9, at 1206.

[237] Book, *supra* note 8, at 577–83.

[238] *Id.*

[239] *Id.*

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B. Costs and Benefits of Collaborative Rulemaking in the Context of the Treasury Regulations

1. Benefits of Collaborating During Treasury Rulemaking

Recent articles by two leading tax scholars have advocated the use of collaborative approaches during Treasury rulemaking.[240] These scholars considered two almost diametrically opposite types of regulation: rules integrally affecting the rights of low-income taxpayers and regulations primarily affecting tax position of corporations[241] and high-income individuals.[242]

Obtaining additional information before issuing regulation increases the likelihood that the proposed regulation will address the concerns taxpayers have about regulations in a particular area.

Tax rulemaking is bound by statutory limitations, frequently with little opportunity for judicial review of the rule adopted.[243] Moreover, if taxpayer participation in the rulemaking process is discouraged by Treasury's apparent lack of interest, taxpayers may question the legitimacy of a tax system that relies so heavily on the IRS and Treasury, rather than Congress, to fashion legislative rules.[244] This is not to say that a collaborative process is needed in the development of each regulation.

However, there are many rulemakings during which stakeholder input would provide value during rule development. One recent example is in the

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[240] *See generally* Ventry, *supra* note 18 and Book, *supra* note 8.

[241] *Id.* (discussing the need for increased public participation in the context of tax regulations that disproportionately affect low income taxpayers, along with recommendations for the inclusion of the National Taxpayer Advocate in the rulemaking process and making it easier for Low Income Tax Payer Clinics ["LITCs"] to provide valuable input on such regulations).

[242] Ventry, *supra* note 18 (advocating a changed penalty structure and along with a more participatory rulemaking process). Innovative rulemaking in the area of taxation is appropriate, as one of the earliest administrative law was the Internal Revenue Administrative Act of 1813, which tasked the Secretary of the Treasury to "establish regulations suitable and necessary for carrying this act into effect; which regulations shall be binding upon each assessor in the performance of duties enjoined by or under this act." 32 ALAN WRIGHT & CHARLES H. KOCH, FED. PRAC. & PROC. JUDICIAL REVIEW § 8153 n.7 (1st ed. 2013).

[243] Hickman, *A Problem of Remedy*, *supra* note 9.

[244] *See generally id.* at 1205–06.

case of the regulation of claims made pursuant to Internal Revenue Code section 6015(f), permitting equitable relief from joint and several liability to an "innocent spouse." With stakeholder input during the drafting stage of Treas. Reg. § 1.6015-5, the Treasury would have had an opportunity to explore the possibility that many equitable relief claims would not be "ripe" within two years, especially with respect to claims that were made outside a case seeking redetermination of a deficiency.[245]

Had Treasury been more comfortable with collaborative rulemaking and actively engaged those with direct interest in the matter, a more effective and "equitable" rule might have been developed. Understanding the evolution of the equitable innocent spouse rules illuminates the benefits Treasury would have reaped. Congress enacted Internal Revenue Code section 6015 during the drafting of RRA 1998. The predecessor statute, section 6013(e) provided insufficient protection to a spouse who was, unaware of back taxes, or otherwise did not meet the stringent criteria needed to assert duress to be considered to have been forced to sign by an abusive spouse, or family court refusing to grant a divorce decree until a final year joint return was filed, a frighteningly common condition.[246]

Internal Revenue Code section 6015(f) provided for an equitable ground for innocent spouse relief. These issues and concerns are not exactly in Treasury's wheel house. Without input, public or judicial, it was unclear which cases would or should fit within this new category of relief. Moreover, Congress itself did not provide much explanation. The innocent spouse rules that went into conference were not the rules that came out of the Congressional conference, and the conferees provided little guidance regarding their intent. Thus, the legislative history is not helpful.

Based on the Congressional testimony and the provisions that went into the conference, it is reasonably safe to assume that Congress intended

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[245] *See* Patrick J. Smith, *Standards for Tax Court Review in Equitable Innocent Spouse Cases*, 134 TAX NOTES 981 (2012); Carlton M. Smith, *Innocent Spouse: Let's Bury That 'Inequitable' Revenue Procedure*, 131 TAX NOTES 1165 (2011) [hereinafter Smith, *Innocent Spouse*]; Fred Stokeld, *Taxpayer Advocate Blasts IRS's Handling of Innocent Spouse Case, Calls for Change*, 130 TAX NOTES 554 (2011).

[246] *See generally* CAROL ROSS JOYNT, INNOCENT SPOUSE: A MEMOIR (2011) (explaining her efforts to satisfy the IRS that she was eligible for innocent spouse relief under the prior innocent spouse provision).

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to expand innocent spouse rights. However, beyond that there are no clear directives with respect to equitable relief. The limited guidance Congress provided was that innocent spouse relief was to be given in cases in which it would be "inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either)."[247] Internal Revenue Code section 6015(f) also conditions its use on the unavailability of relief under Internal Revenue Code section 6015(b) or (c).[248] Congress established a two-year statute of limitations for relief under section 6015(b) or (c), but did not mention statute of limitations in the equitable innocent spouse provision.[249]

The path to final regulations was winding. In the first instance, the IRS set out requirements for equitable innocent spouse relief in a Revenue Procedure,[250] followed by proposed regulations, temporary regulations, and ultimately final regulations. Both the Revenue Procedure and the proposed regulation appeared in the Internal Revenue Bulletin, and also in the *Federal Register*, seeking comment on regulations, which included a two-year time limit on the time a taxpayer had to seek equitable relief.[251] No comments were received and the regulation, Treas. Reg. section 1.6015-5, was finalized. The lack of comments may say more about the effectiveness of the current approach to soliciting comments than about the amount of interest in rules relating to equitable innocent spouse relief.[252]

Although it is possible that the same rule would have been fashioned, it is more likely that, had the drafters worked with low-income taxpayer clinics, poverty law clinics, legal services agencies, the NTA, and other

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[247] I.R.C. § 6015(f).

[248] *Id.*

[249] *Id.*

[250] Rev. Proc. 98-61, 1998-2 C.B. 758. Revenue Procedures are issued to provide taxpayers and their representatives with guidance on an issue, generally in the form of an explanation of the procedures to be followed. Treas. Reg. § 601.601(d)(2)(b) (as amended in 1987). Scholars have questioned whether the APA permits the use of Revenue Procedures that affirmatively affect the rights of taxpayers. Hickman, *IRB Guidance*, *supra* note 203.

[251] Book, *supra* note 8, at 520.

[252] *See generally* JOYNT, *supra* note 246 (describing the author's experience with the IRS after the sudden death of her husband, Howard Joynt, who left behind enormous unpaid tax bills about which she had no knowledge).

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organizations that are not traditionally tapped for assistance, a better rule without a statute of limitations might have resulted instead. However, second guessing what might have happened is not productive, rather, moving forward incident provides a useful lesson: it is important to think broadly about the groups that can provide useful input during the development of a rule.

As a result of the rule as promulgated, many taxpayers claiming equitable relief were required to go through slow, costly litigation to challenge the liability and the IRS' ability to collect it from them. This imposed a hardship on numerous taxpayers,[253] requiring extensive litigation, the creation of a circuit split regarding the validity of the rules, and calls for Congress to make a statutory change.[254] Ultimately, the IRS acknowledged that it was time to reconsider its position regarding a statute of limitations in equitable innocent spouse cases.[255]

Professor Book compares the dearth of comment on the innocent spouse regulations with the overwhelming response received regarding the

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[253] *See, e.g.*, Hall v. Comm'r, 135 T.C. 374 (2010) (invalidating the two-year period of limitations); Mannella v. Comm'r, 132 T.C. 196 (2010) (invalidating the period of limitations), *rev'd*, 631 F.3d 115 (3d Cir. 2011) (reversing the Tax Court's decision relating to the period of limitations); Lantz v. Comm'r, 132 T.C. 131 (2009) (invalidating the period of limitations), *rev'd*, 607 F.3d 476 (7th Cir. 2010). In the years following the promulgation of Treas. Reg. § 1.6015-5, numerous scholars and practitioners have challenged the logic and legitimacy of the regulation. Smith, *Innocent Spouse*, *supra* note 245; Stokeld, *supra* note 245. *See also 2010 Annual Report to Congress*, NATIONAL TAXPAYER ADVOCATE (2010) (demonstrating the problems associated with the time limits in the regulations, and the likelihood that in creating an "equitable" remedy Congress had not intended a two-year statute of limitations to bring claims).

[254] Scott Shumacher, *Innocent Spouse, Administrative Process: Time for Reform*, 130 TAX NOTES 113 (2010); Joseph Goeke, *Tax Court Stands by its Holding in* Lantz *that Equitable Innocent Spouse Relief Reg is Invalid*, 2010 TAX NOTES TODAY 184-211 (2010). The equitable innocent spouse provision was added to the I.R.C. in IRSRRA 1998. It took several years before litigation resulted in a set of facts that was barred by the statute of limitations, but once cases started arriving at the U.S. Tax Court, there were a significant number of taxpayers affected by the statute. Three Circuit Courts of Appeals reversed the Tax Court with respect to its invalidation of the regulation establishing a statute of limitations on equitable innocent spouse cases. Jones v. Comm'r, 642 F.3d 459 (4th Cir.) (overruling the Tax Court's conclusion that the statute of limitations was invalid); Mannella v. Comm'r, 132 T.C. 196 (2010) (invalidating the period of limitations), *rev'd*, 631 F.3d 115 (3d Cir. 2011) (reversing the Tax Court's decision relating to the period of limitations); Lantz v. Comm'r, 132 T.C. 131 (2009) (invalidating the period of limitations), *rev'd, sub nom. In re* Sherwin-Williams Co., 607 F.3d 474, 476 (7th Cir. 2010).

[255] INTERNAL REVENUE BULLETIN, 2011-32, NOTICE 2011-70 EQUITABLE RELIEF UNDER SECTION 6015(f), (2011).

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development and promulgation of regulations for reporting uncertain tax positions (UTP).[256] These two regulations make for a good comparison. Schedule UTP was followed closely by lawyers, lobbying groups, affinity groups, and other interested parties because of the potential economic effect of the new rule, resulting in a great deal of public debate on the issue and feedback, both formal and informal, to the IRS. In contrast, individual taxpayers who may be aided by innocent spouse rules are less likely to know that they will need their protection someday, much less be aware of Treasury's regulatory actions.[257]

For the purposes of this article, a third regulation is worth comparing with the UTP regulations and the equitable innocent spouse regulations which falls somewhere between equitable innocent spouse regulations and UTP regulations: regulation of return preparers. This is an area where lawyers, middle- and low-income taxpayers, and many groups have an incentive to follow closely. Historically, federal regulation of paid tax return preparers has been almost nonexistent, resulting in oversight only insofar as the states regulate preparers or require other licensure, as with CPAs, lawyers, and enrolled agents. There are groups over which there is oversight: tax practitioners, whether they are lawyers, accountants, enrolled agents or enrolled actuaries they are subject to the requirements of Circular 230 when practicing before the IRS.

Beginning in 2002, Nina Olson, the National Taxpayer Advocate has advocated strongly for greater regulation of tax return preparers.[258] In 2008 the Treasury and the IRS began taking steps to regulate paid return preparers. The Treasury first issued a notice of proposed rulemaking, through which it intended to write regulations that would substantially limit the use of refund anticipation loans and other financial products marketed primarily to the poor and unbanked. This notice received substantial attention, and ultimately, this issue was addressed by a change in policy

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[256] Book, *supra* note 8, at 520.

[257] *Id.*

[258] *See, e.g.*, TAXPAYER ADVOCATE SERV.—FISCAL YEAR 2014 OBJECTIVES V (2013) (discussing the regulations that had been promulgated and the subsequent litigation that restrained their enforcement).

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regarding the information the IRS will provide relating to existence of holds on a refund.

The next effort was direct regulation of paid return preparers. The proposed and finalized regulations affected thousands of tax professionals in addition to providing some oversight of tax preparers.[259] Because the regulations defined "preparer" very broadly, many lawyers and accountants who did not routinely prepare returns were required to pass the test, become certified, and satisfy the 15 hour per year continuing education requirement.[260] Preparers were required to pay an annual fee and receive a preparer tax identification number or PTIN.[261]

Prior to the effective date of the regulation, the IRS could not say, with any degree of confidence, how many return preparers there were. This regulation solved that problem. It also resulted in substantial push-back from tax return preparers who had not previously been subject to regulation. The regulations became effective in 2011.[262] Because this was not an issue of assessment or collection of a tax, the Anti-Injunction Act was inapplicable. Those against whom the regulations were to be applied, tax return preparers, could challenge the regulations in the same manner in which regulations from other agencies are challenged. In *Loving v. Internal Revenue Service*,[263] the United States District Court for the District of Columbia concluded that these regulations were not a valid exercise of the IRS' powers, granting both a declaratory judgment and a permanent injunction to the return preparer plaintiffs.[264] The tax return preparers have

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[259] Practice Before the Internal Revenue Service, 31 C.F.R. § 10.8 (2011) (commonly referred to by tax practitioners as "Circular 230").

[260] *Id.* §§ 10.8, 10.9. The approved continuing education programs do not always satisfy the continuation requirement of the bar of CPA board.

[261] *Id.* §§ 10.3, 10.4.

[262] 76 Fed. Reg. § 32,286-01 (2001); 31 C.F.R. § 10.

[263] *Loving*, 917 F. Supp. 2d 67, 72 (D.D. Cir. 2013), 111 A.F.T.R.2d (RIA) 539 (D.D. Cir. 2013). The plaintiffs asked for injunctive and declaratory relief, under the APA, and Declaratory Judgment Act, respectively. *Id.*

[264] *Id.* at 80–81. To be valid, the regulation needs to be within the statutory authority of the agency, here Treasury's authority to regulate those who practice before it, pursuant to 31 U.S.C. § 330. The IRS has appealed the case to the D.C. Circuit Court of Appeals, but has been denied a temporary injunction permitting enforcement of these regulations pending appeal. These regulations have been subject to substantial criticism as overly broad. *See, e.g.*, Michael J. Desmond, *Revisiting the Broad*

a very significant lobby and political clout, including H&R Block, Jackson Hewitt, and Liberty Tax Services to voice their concerns and work to create a regulation that accomplished additional registration and oversight, yet was and not overly burdensome on the return preparers. These return preparers were not the primary concern, rather fringe return preparers such as car dealers and travel agents who prepared a return and then allowed the taxpayer to use the anticipated refund, were much more problematic. The fringe preparers preyed on a particular class of taxpayers, had little training in tax, possessed a conflict of interest because of their incentive to maximize the refund amount, and were considered to be the primary problem. This regulation received many comments reflecting many different views.[265]

Increasing participation may not be easy, few tax regulations receive the kind of attention that these regulations received. However, there are some steps that might encourage greater participation, earlier in the rulemaking process. For instance, directors of low-income tax clinics may be encouraged to comment on proposed rules.[266] The members of these organizations may not have an identical interest with those affected because the leaders of most of those groups are not low-income taxpayers, yet they are aware of common conditions and are empathetic to their problems. Additional public education is needed to inform the public of their opportunity to participate in the law making function. This, along with including affected parties or their representatives in the rule development process, will make the system of tax administration more equitable. It is important for Treasury to consider the factors identified in Part II.B.3.a with respect to each project.

The types of IRS rules that would most clearly benefit from the use of a more collaborative form of rulemaking are those affecting a definable subset of taxpayers generally. Including those who will be affected by the

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Definition of Return Preparer, 130 TAX NOTES 323 (2011). The new regulations set standards requiring preparers to pass a test, register (obtain a "preparer tax identification number or PTIN), and maintain continuing education. For more on the criticisms of the regulations see Nicola M. White, *Year in Review: IRS Begins Implementation of Return Preparer Regulation*, 130 TAX NOTES 52 (2011).

[265] *See generally* regulations.gov.

[266] Book, *supra* note 8, at 566, 577.

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rule in its development will reduce the likelihood of challenges to the rule. Moreover, engaging representatives of the effected group or groups may result in a regulation that will more effectively accomplish the desired outcome, while doing so in a less intrusive or burdensome manner. Greater public involvement could "polarize the positions, without contributing greater responsibility, balance, or consensus to the formulations of resource management policy."[267] On the other hand, agency action based on heavily attended public hearings could result in "meaningless displays of ideological fervor that have no impact on policy or implementation."[268]

The NTA has great influence and the opportunity to speak for people who are, for whatever reason, ignored by the rulemaking process and have little means to raise their own challenges. This is a role she performs with great skill and alacrity. Moreover, the NTA is charged with working to improve IRS service.[269] However, her statutory authority is limited and does not include review and comment on proposed rules prior to their release.[270]

Although the NTA and her staff are very diligent in their efforts to improve the IRS and assist taxpayers, continued consideration of engaging relevant participants in the rulemaking process is needed. Individuals are more difficult to organize and have greater differences in their internal motivations for wanting change. Professor Perritt observed that "a negotiated resolution of a regulatory dispute is likely to be more attractive to interest groups dominated by a few large firms than to public interest groups or other groups with more fragmented membership."[271] Intentional inclusion of other representatives in rule development could richen the

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[267] Rossi, *supra* note 56, at 228 (quoting Robert G. Healy & William Ascher, *Knowledge in the Policy Process: Incorporating New Environmental Information in Natural Resources Policy Making*, 28 POL'Y SCI. 1, 13 (1995)).

[268] Marcus E. Ethridge, *Procedures for Citizen Involvement in Environmental Policy: An Assessment of Policy Effects*, *in* CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING 115 (Jack DeSario & Stuart Langton eds., 1987); Mendelson, *supra* note 44, at 1368.

[269] I.R.C. § 7803(c).

[270] I.R.C. § 7803; 2011 NTA ANNUAL REPORT TO CONG., vol. 1, at 573–81 ("Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives.").

[271] Perritt, *supra* note 84, at 1641.

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texture of the regulations, but it will also require some creativity to engage other groups.

Collaborative approaches could benefit Treasury, IRS, and the fisc. First, the IRS could face fewer legal and enforcement challenges from opponents of new rule. Second, the involvement of multiple views during the drafting process may result in a regulation that more effectively regulates the subject intended. Third, if the regulated parties have participated in the rulemaking process, even if they do not like the result, they may be more willing to accept and follow the new regulation's requirements.

Collaboration and increased participation may lead to better rules. However, if recommendations resulting from collaboration are not used, Treasury and the IRS might need to explain which inputs were not used and the reason why; but such explanation is required with respect to comments received during traditional rulemaking.[272] Without such an explanation, participants may perceive that Treasury and the IRS were not participating in good faith, reducing the participants' willingness to participate in the future. While this may require more effort on the part of Treasury, it would make the regulatory process vastly more transparent.

2. Costs and Challenges Inherent in an Adoption of Collaborative Rulemaking by the IRS

Treasury would face a number of challenges to using collaborative methods of rulemaking. In most cases, there is little risk that these challenges are greater than those faced by other agencies from which Treasury could learn. Because most businesses, individuals, resident aliens, and nonresident citizens have at least one point of connection with the IRS every year, the perception of legitimacy may be even more important than for other agencies. Transparency and inclusiveness in the rulemaking process are of great importance to views of the system of tax administration and compliance with the tax law. Each of the challenges to collaborative

[272] *See generally* Mendelson, *supra* note 44, at 1368 ("Any rule change in response to comments that is beyond a 'logical outgrowth' of the contents of the proposed rule either makes the rule vulnerable to judicial invalidation or requires a new round of notice and comment.").

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rulemaking at Treasury have imbedded within them, a significant potential benefit.

More inclusive rule development will require additional effort. The IRS will need to find an effective means of communicating its priorities more broadly. The IRS has already taken a number of steps that would substantially aid in this effort; it has created a Facebook page, started providing Tweets on Twitter, and vastly improved its website allowing all wired taxpayers greater access to information about what the agency is doing.[273] Other approaches to taxpayer education may be needed to reach people who do not have easy internet access, although low-income taxpayer clinics and poverty law rights groups may be able to cost effectively represent some of their interests.

In addition to process concerns, there may also be practical concerns. Some creativity may be necessary. This is an area where the NTA could be invaluable. Broader participation in rulemaking should improve Treasury's understanding of the ways in which a new rule will affect taxpayers and may even shed some light on the extent to which it will create enforcement problems. In light of the difficulties inherent in reaching true consensus among diverse stakeholders, it will be necessary to have clear parameters of the representatives' responsibilities and charge. Reasonable expectations are essential.

C. Recommendations

Although the Treasury and the IRS go to great lengths to obtain input from the collective of tax practitioners, more could be done to include taxpayers in the rulemaking process. In the context of developing Treasury Regulations using collaborative approaches would protect taxpayers and potentially make participants feel more invested in the outcome and the tax system. Those well plugged-in to the system are currently far more likely to learn of changes that may affect them, than are the less "wired."

It is not easy to reach small businesses, middle-income, and low-income taxpayers. However, there are some relatively easy, low-cost

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[273] *See generally* INTERNAL REVENUE SERVICE, http://www.irs.gov (last visited Oct. 4, 2013) (it is possible to view much of the IRS's social networking with a simple visit to the IRS home page).

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possibilities. Professor Bonfield has suggested using town-hall meetings and field studies, reducing transaction costs for those in the bottom income brackets, and appointing an advisory committee to look out for these issues.[274] Although Professor Bonfield was more broadly considering access to the entire federal rulemaking process, and more narrowly focusing on the access of the poor,[275] many of his recommendation resonate as possible means to increase access for underrepresented taxpayers.

Taxpayer education could increase awareness of the rulemaking process and taxpayers' rights to participate in the process. Some town halls are already conducted, but not by the IRS. Not only could such agency involvement with taxpayers result in better rules, but it could help taxpayers better understand the IRS. The NTA has held town halls to learn about the difficulties faced by taxpayers in complying with tax law. These are great sources of information. The IRS itself could conduct such meetings. To improve the NTA's ability to represent the taxpayer, the office should have greater authority to review and comment on new regulations.

In addition, the IRS has many points of contact with taxpayers. These contacts might be an opportunity to provide education at a low cost. Simply distributing literature regarding the rulemaking process would be relatively low-cost and would be received by taxpayers at the point where they are most conscious of the tax system. However, the increased awareness of the IRS probably cuts both ways. During an audit or other contact with the IRS, such as collection efforts or at a taxpayer assistance center, taxpayers may be less willing to "hear" how they can participate in improving the system of tax administration.

Defining success as giving taxpayers a greater voice in the development of tax regulations, permitting the Treasury to obtain better information, and permitting the development of an effective rule in terms of compliance and enforcement would make a collaborative or negotiated approach worthwhile. Overall, the steps described above would improve the tax system by providing greater opportunity for individual or small groups

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[274] *See* Bonfield, *supra* note 50 (making recommendations to increase the access and representation of the poor in the federal rulemaking context, not as narrowly as at a specific agency).

[275] *Id.* at 524–25.

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of taxpayers to be heard, which is especially critical in tax because of the restrictions on taxpayer suits.

Continued solicitation of comments from tax practitioner organizations will provide some representation for individual concerns. However, depending on these organizations as the primary source for comments about regulations that do not affect their paying clients may be insufficient. This approach relies on volunteers with interest in the subject of proposed regulation (as tax practitioners, as taxpayers, or as people) before the organization's committee will be able to comment on a proposed rule.

There are identifiable costs to creating and nurturing increased participation. There are costs, which may be significant, to identifying and inviting the participation of nontraditional groups. This cost rises as the interests of the taxpayers become less unified.

Finally, the IRS should give greater consideration to the use of collaborative rulemaking efforts when collaboration or negotiation is likely to be productive. That is, Treasury and the IRS should consider the factors identified by Professor Perritt as a measure of the usefulness of collaboration. The number of distinct interests, the ability to identify both distinct groups and representative, and the establishment of clear goals are important in all rulemakings and in the determinations whether a project would benefit from collaboration. Critical to the process would be the demonstration that the Treasury and IRS would participate in the collaborative process in good faith, but that ultimately Treasury would write the rule, which could differ from conclusions on which the group reached consensus because of other interests and concerns. Inherent in collaboration and rulemaking is the possibility of tension between the agency's responsibilities generally, and a collaboration specifically. In light of Congress' response to the IRS's announcement that it would accept submissions of proposed regulations from taxpayers, care will be required to ensure that collaboration is used thoughtfully. However, collaboration is an entirely different idea in that it is not a single taxpayer or industry that can afford to hire someone to work out the rule that best suits those taxpayers.

In approaching a rulemaking project, Treasury and the IRS should remain cognizant that more participatory rulemaking may permit some participants to use the process as a means to delay implementation of a rule that will be costly to them. This is a problem with which the IRS contends regularly with taxpayers' returns and collection. This also is an area in

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which it is important that participants have reasonable expectations. Success will require that the IRS start with clear parameters regarding the time the group will have to develop proposals. Each case may require a separate balancing of the value of immediate promulgation and the accuracy and effectiveness of the rule.

When considering the use of a collaborative process to develop a rule, the NTA and the TAP may be very useful resources. They may be able to recommend certain groups or representatives that should be included in the conversation.

Although the development of many Treasury Regulations may be unsuited to collaborative development, that will not be the case for all regulations. Treasury should take advantage of all available resources, including parties affected by new regulations. Collaborative rulemaking approaches will often provide an opportunity to create a better rule.

CONCLUSION

The Treasury, the IRS, and tax administration could benefit from other agencies' experience with collaborative rulemaking. Collaborative rulemaking is not suitable to all regulations and would pose some challenges. However, when used in appropriate ways, more inclusion in the regulatory process will improve perceptions about the tax system.

The EPA, the FAA, the Department of Education, and other agencies have significant relevant experience using collaborative rulemaking processes. The Treasury and the IRS could benefit from observation of these agencies' experiences, both the successes and the failures.

Using a new process to develop rules may lead to some initial challenges, particularly with respect to determinations about which projects are appropriate for a different approach. However, continued efforts to use a collaborative process in appropriate cases should provide many benefits. The challenges of the task may be eased by a Congressional expansion of the NTA's authority. Moreover, affirmatively enlisting more constituencies will reap many benefits including, most importantly, better regulations. Such efforts also will permit more voices to be heard, making the rulemaking process more democratic.

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